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NOS. 81-2147, 81-2188

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

THE STATE OF ARIZONA, et al.,

Petitioners,

versus

SAN CARLOS APACHE TRIBE OF ARIZONA AND THE NAVAJO TRIBE OF INDIANS, et al.,

THE STATE OF MONTANA, et al.,

Petitioners,

versus

NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, et al.,

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONSE BRIEF OF SAN CARLOS APACHE INDIAN TRIBE AND PAYSON COMMUNITY OF YAVAPAI APACHE INDIANS IN NO. 81-2147

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QUESTIONS PRESENTED

1. Whether, in light of the disclaimer provisions in the federal enabling act and state constitution, Arizona has in personam jurisdiction over federally recognized Indian Tribes and the United States as trustee and subject matter jurisdiction over the Reservation to determine and administer Tribal water rights.

2. Whether, assuming concurrent federal and state jurisdiction, the Tribe's federal water adjudication suits, presenting issues of federal law, should be dismissed or stayed for reasons of "wise judicial administration."

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FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS SAN CARLOS APACHE TRIBE AND PAYSON COMMUNITY OF YAVAPAI APACHE INDIANS IN NO. 81-2147

STATEMENT OF THE CASE

In 1852, the United States and the Apache Nation entered into a Treaty of peace.[1] Under the Treaty the United

[1] Treaty with the Apache Nation, July 1, 1852, 10 Stat. 979.

States, in order to secure the "permanent prosperity" of the Apaches, agreed to designate and adjust their territorial boundaries. Thereafter the Tribe and their Reservations were to be "exclusively under the laws, jurisdiction and government of the United States of America."

From 1852 to 1972 Reservations for the Tribes constituting the Apache Nation were established. Since 1872 — over 40 years before Arizona entered the Union — The San Carlos Apache Tribe has been confined to a harsh and arid Reservation in eastern Arizona consisting of approximately two million acres over which flow the waters of the Gila River and its tributaries.[2] Since 1972 the Payson Community of Yavapai-Apache Indians[3] have resided on a small Reservation in Arizona within the watershed of two tributaries to the Gila River; the Salt and Verde Rivers. Both the San Carlos and Tonto Apache Reservations are within the much larger

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[2]The tributaries of the Gila River flowing over the San Carlos Reservation include the Black River, Salt River, San Carlos River, Eagle Creek, Deer Creek, Ash Creek and the San Pedro River. Other significant tributaries of the Gila River include, without limitation, the Agua Fria River, New River, Hassayampa River, San Francisco River, San Simon River, Santa Cruz River and Skunk Creek.

[3]86 Stat. 783, the Payson Community of Yavapai-Apache Indians shall hereafter be referred to as the Tonto Apache Tribe.

aboriginal territory occupied by the Apache Nation since time immemorial. Confinement to Reservations destroyed their economies which had existed for centuries and forced a drastic and profound change upon the Tribes from which they have not recovered.

On April 26, 1974, the Salt River Valley Water Users' Association (SRV) petitioned the Arizona State Land Department for an administrative determination of rights to waters of a segment of the Salt River. Two years later SRV filed a similar petition for the Verde River, and on February 17, 1978 Phelps Dodge filed two petitions, one for the adjudication of rights to the Gila River and one for the Little Colorado River.

On February 5, 1979, both the San Carlos and Tonto Apache Tribes were "delivered" "notices" by mail requiring them to take certain actions concerning their water rights and pay certain fees or suffer "the possible loss of said water rights for failure to comply in this proceeding." (JA 15).

On March 17, 1979, the San Carlos Apache Tribe, the Tonto Apache Tribe and the Salt River Pima-Maricopa Indian Community, in order to protect their long-recognized rights to exclusive federal jurisdiction, their Reservation property and

to sovereign immunity from any proceeding, filed actions in federal district court [4] seeking to enjoin Arizona and its State Land Department from attempting to assert state jurisdiction over the Tribes and their property, and for a declaration that Arizona lacked jurisdiction to either administratively or judicially adjudicate Tribal water rights in violation of the United States Constitutions, Treaties and Statutes, international law and the State constitution, including, inter alia, the Federal Enabling Act and Arizona's constitutional disclaimer[5] of jurisdiction over Indian lands.

That same day three Tribes, the White Mountain Apache Tribe, the Gila River Indian Community and the Salt River Pima-Maricopa Indian Community, filed actions to remove the administrative adjudications to Federal Court.[6] The Navajo

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[4] San Carlos Apache Tribe of Arizona v. State of Arizona, No. CIV 79-186 PHX-VAC (D. Ariz,) (JA5); Payson Community of Yavapai-Apache Indians v. State of Arizona, No. CIV 79-187 PCT VAC (D. Ariz.) (JA 133); Salt River Pima-Maricopa Indian Community v. State of Arizona, No. CIV 79-185 PHX VAC (D. Ariz.) (JA 159).

[5] See, Act of June 20, 1910, 36 Stat. 557, 569; Ariz. Const. Art. XX, Section 4.

[6] White Mountain Apache Tribe Petition for Removal, No. CIV 79-183 PHX VAC (D. Ariz.); Gila River Indian Community Petition for Removal, No. CIV 79-183 PHX-VAC (D. Ariz.); Salt River Pima-Maricopa Indian Community Petition for Removal, No. CIV 79-184 PHX-VAC (D. Ariz.).

Nation also filed an Amended Complaint seeking a determination of its rights in the watershed of the Little Colorado River, and the Fort McDowell Mohave-Apache Indian Community sought a declaration of its rights to the Verde River.[7] Finally, on April 16 and 17, 1979, the San Carlos Apache Tribe filed actions for the adjudication of its rights in the Salt River, Eagle Creek, San Francisco River and Chase Creek.[8]

On April 24, 1979, Arizona adopted legislation purporting to constitute a "judicial" procedure for determining water rights, transferring the Salt, Verde, Gila and Little Colorado River adjudications from the State Land Department to the Arizona Superior Courts. (JA 108) On November 25, 1981, the Arizona Supreme Court consolidated the adjudications of the Salt and Verde Rivers into the Gila River adjudication.

The district court, disposing of all pending actions in a single opinion, ruled that the Complaints of the Tribe failed to state a claim and that, notwithstanding Arizona's constitu-

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[7] Navajo Nation v. United States, No. 79-276 PCT-VAC (D. Ariz.) (JA 234); Fort McDowell Mohave-Apache Indian Community v. Salt River Valley Water Users' Assoc., No. CIV 79-276 PHX-VAC (D. Ariz.) (JA 330).

[8] San Carlos Apache Tribe v. State of Arizona, No. CIV 79-269 PHX-CAM (D. Ariz.); San Carlos Apache Tribe v. State of Arizona, No. CIV 79-104 GLO-MAR (D. Ariz.)

tional disclaimer of jurisdiction, Arizona had jurisdiction over the Tribes and their water rights pursuant to the McCarran Amendment, 43 U.S.C. §666. As a result of the district court's ruling, the five Respondent Tribes appealed to the Ninth Circuit.

The appeals were consolidated for oral argument on July 15, 1981. The Ninth Circuit also scheduled twelve consolidated appeals from the Montana district court involving similar issues. Reversing the district court, the Ninth Circuit held that Arizona's constitutional disclaimer constituted a legal impediment to Arizona asserting subject matter jurisdiction over Tribally owned property on the Reservation, and that this organic impediment was not overcome by the McCarran Amendment's waiver of sovereign immunity by the United States. Thus, the Court of Appeals held that Arizona courts could only properly assert jurisdiction over the Tribe and their water rights if Arizona had amended its constitutional disclaimer of jurisdiction and complied with the requirements of Public Law 280. Consequently, the cases were remanded for a finding on that issue.

SUMMARY OF ARGUMENT

I.

There is great pressure to divest the Indian Tribes of the Nation of the vestiges of their once vast domains. After their land, water is the most precious of their property rights. Without water the Indians face extinction as Tribes. American Indian law is unique in world experience and has evolved over nearly 500 years since the first Europeans contacted America. It must be interpreted with an understanding of that history. Its inception was based upon sovereign nations dealing as equals. As a result treaties were negotiated, Constitutions and statutes adopted, with reliance upon the fundamental premise that jurisdiction of Indian affairs rests exclusively with the Federal Government and the Tribes. Colonial experience with Indian affairs had significant influence upon the language of the Constitution and Federal laws thereunder. States were divested of sovereignty in Indian Affairs because States between 1778 and 1888 intruded into the exclusive Federal jurisdiction. Congress conditioned the entry of new States between 1888 and 1910 on the express condition that States recognize exclusive Federal jurisdiction in Indian affairs, and agree not to exercise state jurisdiction, or claim

Indian land.

II.

This Court over a period of 150 years has protected Indian property, Treaty obligations and recognized exclusive Federal jurisdiction, keeping the Tribes and their property free of State jurisdiction. The rules of construction that guide review of statutes for the benefit of Indians and their treaties must be construed liberally and ambiguities must be resolved in favor of the Tribes. This rule, together with the history and language of the Act, make it clear that the McCarran Amendment did not grant subject matter jurisdiction to States over Tribal property or the Tribes. To permit the same result by indirect means permits form to rule substance which has never been the rule of this Court.

III.

Arizona's statutes are unconstitutional as applied to the Tribes and their property, directly or indirectly, and violate the Supremacy Clause, and the Fifth Amendment. The United States represents many conflicting Federal agencies and ten Indian Tribes on a single stream and is not adequate to protect the Tribes' property. The Tribes claim water rights based upon aboriginal law, Spanish law, Mexican law and international law

which were reserved by the Tribe and not encompassed in the Federal Trust. The Arizona stream proceeding on the Gila River is not a McCarran proceeding because it is an interstate and international stream over which Arizona has no jurisdiction and was specifically exempted from the McCarran Amendment. The statute has many fatal defects, is administrative and not judicial, and is inherently biased against Indians. Federal Court is the preferred forum for matters involving Federal Constitution, Treaties and Statutes and the suits filed by the Tribes should be permitted to proceed in Federal Court.

Reinstatement of the district court's order places the Tribes, their property and the United States as Trustee in State proceedings and is intolerable. The Ninth Circuit must be affirmed.

ARGUMENT

I.

HISTORY

A. Prologue

"IF THE INTERIOR DEPARTMENT IS MADE THE REPOSITORY OF WATER RIGHTS, BE THEY IN THE UNITED STATES GOVERNMENT OR IN INDIVIDUAL CITIZENS, DOES THAT MEAN THAT INDIAN RIGHTS WILL ALSO BE INTEGRATED?" — Senator Chavez of New Mexico.

"NO." — Senator McCarren. Senate debates on the McCarran Amendment, 43 U.S.C. §666.

92 Cong. Rec. 12948 (1951).

Based upon the McCarran Amendment,[9] which makes no mention whatsoever of Indian water rights, Arizona and Montana request that this Court declare that Congress has granted and transferred jurisdiction and power to the states over the Indian Tribes on the Reservations and their valuable water rights.

B. History: A Perspective.

> "History is better than prophesy. In fact, history is prophesy. And history says that whenever a weak and ignorant people possess a thing which a strong and enlightened people want, it must be yielded up peaceably." A Treasury of Mark Twain, edited by Edward Lewis and Robert Myers (1967), p. 31.

Indian water rights have become to the late Twentieth Century what Indian land rights were to the Nineteenth Century. The same arguments are now made for the confiscation of Indian water rights as were made for Indian land, including the overwhelming need to serve the rush of western settlement. In the great southwest no property is more dear than

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[9] 43 U.S.C. §666 appears in "Public Lands" of the United States Code.

water. The Ninth Circuit Court of Appeals has dealt with the topic of Indian property confiscation. In United States v. Ahtanum Irrigation District, 236 F.2d 321, 337 (9th Cir. 1956), the Court said:

> "[H]istory largely supports the statement: 'From the very beginning of this nation the chief issue around which federal Indian policy has revolved has been, not how to assimilate the Indian Nation whose land we usurp, but how best to transfer Indian lands and resources to non-Indians.'"

Only the strength of this Court has tolled the repetition of history. The Supreme Court in Winters v. United States, 207 U.S. 564 (1908) understood the tremendous pressure under which the Indian Tribes were being placed in the rush of western settlement. The Tribes were placed on Reservations, frequently much smaller than, and sometimes outside of, their aboriginal territories, and thus their economies, which had existed for centuries, were destroyed.

The Winters doctrine confirmed that water was reserved by or for Tribes to make their lands "adequate and valuable" and ". . . without which their lands would have been useless." Id. at 600. The Court realized the tremendous economic competition which could be mustered against the Indian Tribes. It knew that State law would not provide adequate

protection. Therefore, the Court established the doctrine that the water rights could not be diminished by the application of state law. Id. at 577.

Granting the Petitioners' request would result in a breach of the sacred integrity of the Nation. It would repudiate over 200 years of Federal law, including statutes and treaties, based upon the fundamental premise that the jurisdiction over Indian Tribes and their reservations is the exclusive prerogative of the federal government and the Tribes. The threat to Indian water rights, and therefore the very existence of the Tribes is at hand.[10]

Nowhere in the history of jurisprudence is there a body of law of equal experience with "Federal Indian Law." Truly it is "sui generis." It is the result of nearly 500 years of European colonization of a continent occupied by Indian Nations.

Only within the specific context of this history can this body of law be adequately understood and interpreted.

C. 1492 to 1778: Early Principles Develop

The Constitution of the United States resulted from the

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[10] These are " . . . questions of life and death importance to Indians," Colorado River Conservation District v. United States, 424 U.S. 800, 826 (1976) (Stevens, dissenting opinion) (hereinafter referred to as "Akin").

composite experience of the original Thirteen Colonies and the scholars of the day. The language and structure of significant sections exist due to the experience of the Colonies with foreign nations and Indian Tribes.[11]

For nearly 500 years the Indian Tribes of this continent have transacted business as sovereigns with foreign nations. The nations of Europe and the United States dealt with the Indian Nations as sovereigns[12] and created alliances[13] with

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[11]"Foreign Nations" and "Indian Nations" or "Tribes" were commonly used interchangeably, with the former term encompassing the latter term, but not the antithesis. During the drafting of the Constitution, separate clauses were drafted to describe the nations by location. Those which did not originate on the continent were "foreign," and those which did were Indian. Even after the distinction, the founders occasionally used "foreign" as encompassing Indian Tribes.

[12]These countries included Great Britain, Holland, Mexico, Russia, Spain, France and the United States of America. "The first mention of a European nation developing a treaty ... with the Indian Tribes to secure Indian consent to cessions of land or changes of political status was made in 1532 by Franciscus de Victoria. F. Cohen, Federal Indian Law, 46 (1942), hereafter "Cohen," citing Victoria, De Indis et De jure belli relectiones (trans. by J. P. Bate, 1917), 1557, sec. 2, title 6,7. "The idea that land should be acquired from Indians by treaty involved three assumptions: (1) that both parties to the treaty are sovereign; (2) that the Indian Tribe has a transferrable title, of some sort, to the land in question; and (3) that the acquisition of Indian lands could not safely be left to individual Colonists but must be controlled as a governmental monopoly." Cohen, supra, at 47.

[13]Delaware Indian Treaty, 7 Stat. 13 (1778) with the United States under the Articles of Confederation, W. Washburn, The American Indian and the United States, Vol. III, 2263. This was (Cont.)

them in times of war and treaties with them to resolve questions concerning war, territory and jurisdiction.[14]

D. The Union Under Confederation.

After the Declaration of Independence, the states feared that the foreign governments, such as France, Britain or Spain, might attempt to form coalitions with the Indian Tribes or other states to defeat the Colonies.[15]

The Colonies associated as States under the Articles of Confederation and only Congress was permitted to declare war, enter into treaties or alliances and it had the "exclusive right and power . . . regulating the trade and managing all affairs with the Indians . . . ."[16]

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the first treaty made by the United States under the Articles of Confederation.

[14]Kappler, Indian Affairs, Laws & Treaties, Volumes I through VII (2d Ed.). See specifically, Treaty With the Apaches, July 1, 1852. 10 Stat. 979, 981, Articles I, III, VIII and IX. See also, Treaty With the Navajo Nation, June 1, 1868, 15 Stat. 667; (J. A. 296-306).

[15]Major concepts to deal with these problems were embodied in the language of the Articles of Confederation, the Northwest Ordinance and the Delaware Treaty. Those concepts eventually found their way into the Constitution, the Trade and Intercouse Acts and the Treaties with foreign nations and the Tribes. Included were inter alia, the exclusive power in the federal government to wage war, make treaties, deal with foreign policy (including Indians), and to regulate the property of the country. See, Article 9, Articles of Confederation (1778).

[16]Id.

Under the Confederation, the Northwest Ordinance reflected the first Congressional policy of the United States toward Indian Affairs.

> "The utmost good faith shall always be observed towards the Indians; their lands and properties shall never be taken from them without their consent; and, in their property, rights, and liberty, they shall never be invaded or disturbed unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made for preventing wrongs being done to them and for preserving peace and friendship with them."[17]

Congress also set policy prohibiting new states from interfering ". . . with the primary disposal of the soil by the United States, in Congress . . ." and from taxing property of the United States[18].

The national government had legal but no practical enforcement powers. A number of states attempted to dominate or tax trade, adversely to other states,[19] and to seize

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[17]Northwest Ordinance, July 13, 1787, 1 Stat. 51, Article III. This was an assertion of " . . . Congressional authority in Indian relations in the face of the casual flouting of that authority by states such as Georgia and North Carolina, which continued to make both formal treaties and unauthorized encroachments on Indian lands within their boundaries. By itself, the Ordinance could not settle the conflict, but it . . . did establish a statement of basic policy . . . of Indian rights and Federal authority. . . ." The American Indian and the United States, supra, Volume 3, page 2144.

[18]Northwest Ordinance, 1 Stat. 51, Art. VI.

(Cont.)

territories in the West.[20] Others had deliberately and repeatedly violated treaties made by the United States with foreign nations and Indian Tribes.[21] Thus, support grew for the adoption of a new Constitution which would enable the United States government to enforce its authority over the states to: levy taxes, make war, deal exclusively with the foreign and Indian nations, to govern the entry into the Union of new states,[22] and to prevent state alliances, control of trade, and seizure of western lands.

E. The Constitutional Convention.

On Friday, May 25, 1787, the Constitutional Convention convened.[23] An early resolution described that Congress should be empowered

> ". . . to legislate in all cases to which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation; to negative all laws passed by the several states, contravening in

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[19] J. Madison, Notes of Debates in the Federal Convention of 1787 'Preface to Debates in the Convention: A Sketch Never Finished Nor Applied', at 14 (hereinafter referred to as "Madison Notes").

[20] J. Madison, Journal of the Federal Convention, edited by E. H. Scott (1898), 33 (hereinafter referred to as Madison Journal).

[21] Madison Notes at 14.

[22] Madison Journal at 32-51.

[23] Id. at 53.

> the opinion of the National Legislature the Articles of Union; . . ."[24]

Other resolutions included the establishment of a National Judiciary appointed for life[25] and that provision should be made for admitting new states into the Union.[26]

The concept of equal footing as first proposed was that states should be equal in all matters under the Constitution and should maintain total sovereignity after the new Constitution. That concept of total equality was substantially modified.[27] The concept had four parts: the election of the President, representation in Congress, dealings between states,[28] and finally whether states would remain sovereign and therefore equal to the federal government.

The resolution of these issues resulted in significant "inequality" and surrender of state sovereignty in many areas. Election of the President was resolved (unequally) by the appointment of Electoral Delegates based on the total number of Senators and Representatives from each state. Representation in Congress was resolved by the establishment of two

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[24] Madison Notes at 31.
[25] Madison Notes, at 32, No. 9.
[26] Madison Notes, at 32, No. 10.
[27] Id at 37-38.
[28] Madison Journal at 191.

houses of Congress. The Senate provided equality on matters where states were deemed to have equal concern on matters of national interest, such as appointments of Cabinet level officers, appointments to the Federal Judiciary, and the ratification of treaties.

It was concluded that states should have equal access to trade and the waterways of commerce, but should be unable to deal with foreign or Indian nations. These concepts anticipated the total relinquishment of certain elements which were formerly perceived to be fundamental to state sovereignty.

By the time the drafting of our present Constitution was concluded, it had become an accepted principle that the Federal government, and not the states, should be the only government permitted to engage in wars, to make treaties and to regulate commerce. Encompassed in all three of these principals was the exclusive authority of the United States in all dealings with the Indian Tribes.

The concept that federal power under the Constitution would be from the people and not the states was adopted.[29]

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[29]The Constitution originating in the people instead of the states was also developed and assisted in the ultimate establishment of the Supremacy Clause.

This was necessary to prevent state governments from having too great an influence in the national government.[30] Madison warned that

> ". . . where a majority are united by a common sentiment, and have an opportunity, the rights of the minor party become insecure."[31]

Considerable attention was given to conciseness. Concepts encompassed by others were deleted. An effort to empower Congress to "negative" state law in contravention of Federal law was deemed to be unnecessary[32] because of the Supremacy Clause. The power of the President to "enforce treaties" was likewise deleted as superfluous "since treaties were to be 'laws'."[33]

The language concerning the United States' relationship to Indian affairs likewise underwent considered revision. With the exclusive power of the national government under the war and treaty powers of the President and the power of the Senate to ratify treaties, the language which resulted, "regulate commerce with foreign nations, and among the several states and with the Indian Tribes," was considered sufficient to

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[30] Madison Notes at 77.
[31] Id. at 76, 77.
[32] Madison Journal at 594.
[33] Id.

exclusively vest in the Federal government all manner of dealings with Indian Tribes[34].

To complete the concept that state legislatures and courts would have no effect in matters of National concern, the Convention developed the Supremacy Clause, which declared the Constitution, the laws and all treaties of the United States to be "the supreme law of the land" and that no state law could be enforced to the contrary[35].

The Property Clause resulted from competition among the states for land on the Western frontier. Federal advocates preferred federal ownership. Others feared that new states would not be admitted if the property power was vested exclusively in Congress.

The "new state" and the Property Clauses[36] gave Congress the exclusive power to admit new states and ". . . to dispose of and make all needful rules and regulations respect-

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[34] Madison Journal at 190, 549, 654, 704, 753; Madison Notes at 31, 34, 44.

[35] U.S. Const., Art. VI, cl. 2; The Federalist, No. 44 (Madison). It was also considered necessary because the constitutions of some states declared that the constitutions of the states were the supreme law of the land. There was perceived to be ". . . no incompatibility between the National and State governments provided the latter were restrained to certain local purposes . . ." Madison Notes at 78, 79.

[36] U. S. Const., Art. IV, § 3, cl. 2.

ing the territory or other property belonging to the United States . . . . " The Property Clause preserved the right of the United States and states to submit claims to Congress for territorial lands.

Certain delegates to the Convention proposed a Judiciary composed of a Federal Supreme Court with mere appellate jurisdiction from state courts[37]. It was urged that appellate jurisdiction was sufficient in all cases of the first instance and that a Federal Judiciary was an unnecessary encroachment upon the jurisdiction of the states.[38] This issue was resolved against the state jurisdiction, in favor of a Federal Supreme Court with such other Federal Judiciary as was deemed advisable by Congress, with jurisdiction over the Constitution, treaties and laws of the Nation.[39]

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[37] Madison Journal at 67, 68, 164.

[38] Madison Notes at 71.

[39] Appeal from state courts to the Federal Supreme Court, it was feared,

> ". . . would not in many cases be a remedy. What was to be done after improper verdicts in state tribunals obtained under the biased directions of a dependent judge, or local prejudices of an undirected jury? To remand the cause for a new trial would answer no purpose . . . an effective [Federal] judiciary establishment, commensurate to the legislative authority, was essential . . . ." Madison Notes at 74.

(Cont.)

After the adoption of the Constitution, John Adams was asked to serve on the Board of the "American Society for Promoting the Civilization and General Improvement of the Indian Tribes Within the United States" in 1822, declined and succinctly replied:

> "the President, Senate, and House of Representatives, assisted by the subordinate labors of the heads of departments, are constituted authorities for conducting all our foreign relations and their power and means are fully adequate to the service . . ."[40]

Thus, the relationship of the Indian Tribes to the Federal and state governments and to foreign nations played a decisive and pervasive role in the framing of many provisions

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> "The wisdom of the Convention, in committing such questions to the jurisdiction and judgment of courts appointed by and responsible only to one national government, cannot be too much commended. . . Such violences are more frequently occasioned by . . . one or two states than of the Union. Not a single Indian war has yet been occasioned by aggressions of the present Federal government, feeble as it is; but there are several instances of Indian hostilities having been provoked by the improper conduct of individual states . . . [a]nd nothing can so effectually obviate that danger as a National government, whose wisdom and prudence will not be diminished by the passions which actuate the parties immediately interested." The Federalist No. 3 (Jay) (C. Rossiter 1961) 43-45.

[40]Letter from John Adams to Reverend Jed H. Morse, City of Washington, March 2, 1822.

of the Constitution.

F. After The Constitution, 1788 to 1888.

Congress admitted new states into the Union on a case-by-case basis as the settlement of the territory west of the states continued from 1788 to 1888.

The Constitution was ratified on June 21, 1788. The Indian Tribes of the Western hemisphere were still recognized to be full sovereigns capable of making war, compacts and treaties with other countries and the United States. On the same day, the states of the United States were divested of all elements of sovereignty dealing with the same subject matter.

Congress began to legislate in the area of Indian affairs by the adoption of the Trade and Intercourse Acts, which maintained at all times the exclusive nature of the federal authority over Indian affairs. In 1790, at the request of President George Washington, Congress adopted an Intercourse Act which included the restriction that title to Indian land could not be affected by any person or state without the authority of the United States.[41] In 1802, at the request of President Thomas Jefferson, Congress adopted an Intercourse

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[41] 1 Stat. 137, 138 (1790).

Act defining the jurisdiction and laws of the United States as to be exclusive within Indian territory. The Act provided that laws of the states and territories operated against all persons outside Indian territory, and repeated the rule that states could not deal in any manner with an Indian Tribe or affect the title to any Indian property.[42] The Intercourse Act of June 30, 1834 codified previous trade and intercourse acts.[43] It confirmed the concept of exclusive Federal jurisdiction over Indian Tribes and Indian property.[44] In addition, it confirmed that states and territories were permitted to prosecute Indians outside the reservation.[45] In 1878 Congress confirmed that the exclusive rule of Federal jurisdiction over Indian Tribes and their property within Indian country was to be applied to all territories and adopted "The Law Common To All Territories."[46]

When the New Mexico Territory was established by Congress on September 9, 1850, [47]the Territorial Act expressly encompassed the existing law of the United States and thereby

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[42]2 Stat. 139, 147 (1802).
[43]Act of June 30, 1834, 4 Stat. 729 (1834).
[44]Id. at §25.
[45]Id., §26.
[46]Revised Statutes of 1878, Title XXIII, Chapter 1, Section 1839: Kappler, Indian Affairs and Treaties, Vol. 1, p. 3, (2d. ed.).
[47]9 Stat. 446, 452, §17 (1850).

confirmed that in the New Mexico Territory no person, territory or state had the power of regulation and jurisdiction over Indian Tribes and Indian property within Indian country without the consent of Congress and the Tribes.[48]

G. The Apache Experience From European Contact to Statehood; U.S. Policy in the Territories and Indian Country.

The Apache Nation dealt specifically with Spain,[49] Mexico and the United States. During the effort to colonize the Southwest, the Spaniards first attempted unsuccessfully to use force to subdue the Apaches.[50] Thereafter, they negotiated treaties and instituted a policy of Reservations and government support to gain peace with the Apaches.[51] Mexico and the United States in turn repeated the same course.

On July 1, 1852, the United States entered into a treaty with certain Indian chiefs "acting on the part of the Apache Nation of Indians situate and living within the limits of the United States."[52] Article 1 of the Treaty states:

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[48] See also, 9 Stat. 574, 587 (1850).

[49] The first European account of contact with the Apaches was The Spanish entradas of Antonio de Espejo in 1583. 1 J. Harte, The San Carlos Indian Reservation, 1872-1886: An Administrative History, 9 (1972) (hereinafter referred to as "Harte").

[50] Id. at 10.

[51] Id. at 11-13. See also 17 H. Bancroft, History of Arizona and New Mexico, 1530-1888, at 285, 315, 372, 381 (1889) (hereinafter referred to as "Bancroft"); Harte, at 13, 14.
(Cont.)

"Said Nation or Tribe of Indians through their authorized chief aftersaid do hereby acknowledge and declare that they are lawfully and exclusively under the laws and jurisdiction and government of the United States of America, and to its powers and authorities they do hereby submit." [emphasis added].

Unlawful interference by states and settlers in Indian and foreign affairs gave the United States such alarm in its efforts to comply with the treaty obligations with Indian Nations and Mexico[53] that by the time the states which we now know as the "disclaimer" states made application for entry into the Union, Congress was acutely sensitized to the need to make them keenly aware that they would have no authority to seize or claim the land of Indian Tribes or Mexico or to exercise any governmental power or jurisdiction over the Indian Tribes or their properties.

The United States had observed Georgia illegally seize lands from non-Indians granted from Great Britian and from Indian Tribes guaranteed by United States Treaties. It had also experienced two wars precipitated by the seizure of portions of Mexico by United States citizens and saw Texas unlawfully

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[52]10 Stat. 979, 981 (1852). (See Tribes Appendix G (hereafter cited "TA") for full text).

[53]Message of the President, Dec. 4, 1852, Cong. Globe, App. 32nd Cong., 2d Sess., p.4.

refuse to recognize any right of the United States to protect the lands of Indians in Texas.[54]

In the New Mexico Territory the government experienced disruption of Indian affairs by settlers through the illegal introduction of liquor and gambling into the Reservation and the extraordinary use of the Territorial Legislature and local Courts to disenfranchise Indian Tribes of their Tribal property.[55]

> "[A]nd as a consequence of prejudice that has always existed between the two races, shows itself in their judicial proceedings, I would respectfully recommend that by Act of Congress all suits against these Indians shall be brought only before United States District Courts in order that justice may be done to all parties." (emphasis added)[56]

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[54]Report of the Secretary of War, Dec. 4, 1852, Cong. Globe, App., 32nd Cong., 2d Sess. p. 6; Report of the Secretary of Interior, Dec. 4, 1852, Cong. Globe, App., 32nd Cong., 2d Sess. p. 6; Report No. 46, Report of the Secretary of Interior (Superintendent J. F. Collins to Commissioner Wm. Dole, Oct. 8, 1861); Report No. 41, Report of the Secretary of Interior (Superintendent M. Steck to Commissioner Wm. Dole, Sept. 19, 1863).

[55]Report No. 94, Office of Superintendent of Indian Affairs, Santa Fe, September 1855; Report No. 71, Office of Superintendent of Indian Affairs, Santa Fe, September 30, 1851; Report No. 47 (1867), C. A. Mix, Acting Commissioner to O. H. Browning, Secretary of the Interior; Report No. 56, Report of the Secretary of the Interior, Office of Agent for Pueblo Indians, Letter from Agent J. Ayers to Commissioner E. S. Parker, September 8, 1869.

[56]Report No. 56, Office of Agent for Pueblo Indians, September 8, 1869.

In August of 1858 the Indian Agent for the territory of the San Carlos Apache and Tonto Apache Tribes reported that it was necessary to establish a military post ". . . not only to control the Indians, but to prevent improper intercourse with the citizens . . . until a law of Congress be passed declaring the same an Indian Reserve."[57] And in 1859, he recommended a Reservation pursuant to the Treaty in the Gila Valley for the Apaches and to confirm that their lands would be ". . . inalienable except to the United States."[58]

In 1863, Superintendent M. Steck reported that there was such an invasion of settlers into the territory of the Apache that the Apaches were being

> "divested in this way of all their peculiar and former means of subsistence, in contending with a race who, under the circumstances, can feel no sympathy with them, the Indian must soon be swept from the face of the earth. If every red man were a Spartan, they would find it impossible to withstand this overpowering influx of immigration. Humanity and religion, therefore, demand of us that we interpose a barrier for their safety, this can be effected only in the way we have been considering."[59]

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[57] Report No. 75, M. Steck, Indian Agent, August 10, 1858 to J. L. Collins, Superintendent of Indian Affairs.

[58] Report No. 170, Report of the Secretary of the Interior, M. Steck, Indian Agent, Santa Fe, New Mexico, August 12, 1859 to J. L. Collins, Superintendent Indian Affairs.
(Cont.)

In 1866 the Navajos had been relocated to the Reservation of Bosque Redondo. As a result, the settlers had formed an "anti-Bosque" party which had encited the territory to the "bitterest feelings . . . which probably death alone can remove."[60]

The newspapers and local governments of territorial Arizona were openly hostile towards the President's peace policy with the Indians and attempted to frustrate it by inflaming the citizens to war. The official policy of the non-Indian population in Arizona was genocide.[61]

In 1869 the Secretary of the Interior summarized the difficulty which the United States was having with the states and settlers in the territories. The Commissioner reported to Congress that the Tribes viewed treaty obligations strictly.

"Numerous treaties have been made with the dif-

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[59]Report No. 41, Report of the Secretary of the Interior (Superintendent of Indian Affairs M. Steck to Commissioner of Indian Affairs Wm. Dole, Sept. 19, 1863).

[60]Report No. 40, Report of the Secretary of the Interior, Report of Special Agent J. K. Graves, 1866. See also, 43 Cong. Rec. 2422, 2423, Feb. 15, 1909.

[61]Report of the Commissioner of Indian Affairs, Condition of Apache Indians—Camp Apache, White Mountains, Arizona, September 18, 1871, pp. 55-57; Peace with the Apaches of New Mexico and Arizona, Report of Vincent Colyer, at 5-6 (1871).

ferent Tribes and the negotiations attended by the observance of all the diplomatic forms and ceremonies practiced among independent, absolute nationalities. In some instances . . . failure of . . . strict adherence to treaty stipulations, . . . has . . . occasioned dissatisfaction among the Indians as they expect every promise to be fulfilled to the letter, and when this is not done, they regard the non-compliance as a willful violation of good faith and integrity."

He reported that:

"Among the chief causes of these wars . . . the following: 1) dissatisfaction of the Indians in consequence of having sometimes been betrayed into the cession of their lands by pretended treaties. 2) the constant failure of the government to fulfill in good faith its treaty obligations with the Tribes. 3) the frequent and unprovoked outrages and murders of Indians by soldiers and white citizens. 4) the impossibility of obtaining justice in local courts or of punishing white criminals for the reason that the testimony of Indians is not allowed in those courts. 5) the unlawful occupation, by the whites, of lands not ceded nor treated for. 6) the shameful fact, that of all the appropriations made by Congress for their benefit only a small part ever reaches them. . . . It is our national duty to make such provision as shall ensure the faithful performance of our national obligations. No nation can safely disregard the just claims of even the humblest class of citizens. . . . Deeply impressed with the vast importance of our Indian affairs, as involving both our national interest and our national honor, we desire respectfully to commend them to the wisdom, patriotism, and justice of Congress."[62]

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[62]Report of Gen. Com. of U.S. Indian Commission to Congress, July 14, 1968 (App. A to Rep. of V. Colyer, U. S. Spec. Indian Comm'r to F. Bruner, Chm. of Indian Comm'rs, in Report of (Cont.)

After the establishment of the Reservation, the Apaches still were subject to abuse, for as they became more and more dependent upon farming, the settlers encroached upon the Reservation to take their fields and their water. In 1880, the Commissioner reported to Congress that:

> "The subject of a water supply, which is an all important one throughout Arizona, becomes a grave one whenever it concerns an Indian Reservation, the prevailing opinion being that Indians have no water rights which white men are bound to respect. Although the San Carlos Reserve is comparatively well supplied with streams, and although scarcely a beginning in farming has been made, the water question is already assuming serious proportions. The agent reports:
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> "The water in Gila is being rapidly depleted by large quantities being taken out by ditches in the vicinity of Pueblo Viejo, twenty miles above Camp Thomas, and a fifteen-foot ditch now being dug by the Mormons in that vicinity will, in low water, seriously damage the water privileges on this reservation. If there is any law in regard to this it should be enforced so that the Indians can be protected in their water rights, a matter of vital importance to their advancement and civilization, as work and education are the foundations for their moral elevation."[63]

H. The Disclaimer States.

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the Secretary of the Interior 1869).

[63]Report of the Commisioner of Indian Affairs to Congress, 1880, p. 22 (emphasis added).

With this vast reservoir of negative experience to draw upon and seeing the states which had been admitted into the Union frustrating the exclusive jurisdiction of the United States to manage Indian affairs, Congress in 1889 passed the first Disclaimer Act.[64] The Indian provisions were clearly enacted for their protection and benefit. The Act was a confirmation of the law as it had stood since the Articles of Confederation, but which had been largely ignored by the people of the territories and not infrequently ignored by the states.

The purpose was to make it abundantly clear to "would-

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[64]Act of Feb. 22, 1889, ch. 180, 25 Stat. 677, resulting in statehood for North Dakota, South Dakota, Washington, and Montana. See also: H. R. 8466, 50th Cong., 1st Sess. (1888); S. 185, 50th Cong., 1st Sess. (1888). The Territory of New Mexico was originally included but was removed. Between 1888 and 1910 all disclaimers remained substantially unchanged through the final Enabling Act and Resolution permitting statehood for Arizona. The New Mexico and Arizona Enabling Act was actually more restrictive because it required a provision concerning alcohol, and that the Pueblo Tribes would not be subject to state law but rather would be recognized as other Indian Tribes to which the law of the United States applied. Hearing on Statehood Bill 58th Cong., 1st Sess. House of Representatives Committee on Territories, December 11, 1903, pp. 23-24, 48, 49, 51, 57, 67; Hearings before the House of Representatives Committee on the Territories, & Statehood for Arizona and New Mexico, 59th Cong., 2nd Sess. (1906) January 16, 17, 18, 19, and 20, pp. 37, 99, 101, 103.

be" states that Congress intended to exercise its exclusive and plenary authority over Indian affairs and as a condition precedent to their entry into the Union, states were required by Congress to disclaim all right and title to the Indian properties and to forever refrain from attempting to exercise jurisdiction or control over the Indian Tribes or their Reservation until the title was extinguished, no matter whether that property had been acquired from the United States or a prior sovereign.

When Congress first imposed these conditions it generated heated debates on the dire consequences to state jurisdiction which would result from these "special conditions." The states recognized that they would have no governmental jurisdiction within the exterior boundaries of an Indian Reservation in any manner whatsoever. In addition, states realized that they would not be able to claim lands occupied by the Indians.[65]

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[65]"At page 10 of the H. R. Rep. No. 1025, 50th Cong., 1st Sess. (1888), the Committee on the Territories stated:

> "'In the northern portion of Montana there are numerous Indian reservations, lands within which are excluded from the operation of the Bill . . .'; and
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> "'. . . until the Indian titles thereto have been

(Cont.)

It was argued that any conditions would deny entry of the state into the Union on "equal footing" with the original States. The consistent reply of Congress was that "equal footing" was not a matter which originated in the Constitution but rather was a matter in the sole prerogative of Congress.[66]

> extinguished by the United States, such Reservation shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.' Id. at 2.

The floor debate, 20 Cong. Rec. 798 to 825 (1889), sheds further light on the meaning of the disclaimer clause:

> "'But I want to call attention now to the peculiar provisions of this subdivision of this section. . . . They are most extraordinary. We must have jurisdiction over these Indians to a certain extent." Id. at 813. (emphasis added)

Finally, the debates show concern that

> " . . . at least 37,000 square miles of South Dakota are covered by Indian reservations. If you deduct this area from the 77,000 square miles comprised within South Dakota, it will leave an area upon which the government of South Dakota will operate of only 40,000 square miles." and ". . . there are . . . nine Indian reservations, the jurisdiction over which is reserved to the United States. . ." 19 Cong. Rec. 2838, (1888). (emphasis added)

[66] See Letter from T. B. Catron, January 31, 1910 to Honorable W. H. Andrews. (Delegate to Congress). See also 45 Cong. Rec. 8486 (1910) (remarks of Rep. Houston) ("This bill does not recognize the full sovereignty of these states when admitted into the Union, but imposes conditions upon them that will control their actions in regard to certain matters for years to (Cont.)

Congress could condition the admission of states into the Union on such specific conditions as, in its opinion, the times and local conditions in the states required . . . and it did.[67]

Congress, as a condition precedent, described the specific conditions under which the states of Arizona and New Mexico would be permitted to enter the union.[68] Congress

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come.")

67 "The whole bill is drawn to conform a nearly as may be to the language of previous enabling acts and contains such provisions as may be in their nature be common to all, besides such additional provisions as are made necessary by existing law and local conditions". H.R. Rep. No. 2079 60th Cong., 2d Sess. (1909) (emphasis added).

"Article IV., Section 3 of the Constitution of the United States provides that internal 'new states may be admitted by the Congress' into the Union, but the Constitution nowhere defines the qualifications of territories for statehood. Congress therefore has discretion as to what conditions shall be required of territories seeking admission as states . . . " Id pp. 4, 5. (emphasis added)

See also H.R. Rep. No. 152, 61st Cong., 2nd Sess. (1910), which contains an identical provision.

68 "[T]hese people, having obeyed our command, having conformed to the Enabling Acts which we passed almost without a dissenting voice when we reached the end of that controversy, having done all that we required of them . . . .

"I know that the faith of the American Congress has been pledged that she may become a state by conforming to the terms of the Enabling Act . . ." — Senator Bailey, 46 Cong. Rec. 4131, (March 3,

(Cont.)

permitted the states to claim land for specific purposes within the boundaries of the to-be-formed states, reserving from such claims any forest or "other reservation" of the United States.[69] To remove any implication of a State claim under the Constitutional Property Clause, Congress required the states of New Mexico and Arizona to specifically disclaim all right, title and interest in certain federal lands and lands owned or held by an Indian or Indian Tribes.[70]

In addition, Congress required a number of other pro-

1911).

"They have complied with all the conditions we have laid down." — Senator Lodge, Id.

"That the constitution formed by the Constitutional Convention of the Territory of Arizona ... complying with the terms of said Enabling Act, ... is hereby approved." 46 Cong. Rec. 4319 (March 4, 1911) (proposed resolution).

See also, letter from President Taft, dated February 24, 1911, to the Senate and House of Representatives.

[69] Hearings on Statehood for Arizona and New Mexico, before the House of Representatives Committee on the Territories, 60th Cong., 2d Sess., at 16, 21 (Jan. 26, 1909); See also H.R. Rep. No. 152 p. 4, 61st Cong., 2nd Sess. (1910).

[70] Hearings on Statehood for New Mexico and Arizona, Before the House of Representatives, Committee on the Territories, 61st Cong., 2nd Sess. at 5,11, (January 12th and 13th, 1910). See also letter from the Office of the Governor of the State of Arizona, Richard E. Sloan, dated December 22, 1909 to Honorable Edward L. Hamilton, Chairman, Committee on Territories, House of Representatives, Washington, D. C.

visions for the benefit of Indians. It specifically precluded the states of New Mexico and Arizona from taxing Indians or Indian lands within Indian country.

Finally, for the benefit of the Indians and to specifically confirm the policy which has existed from the time of the Articles of Confederation to this date, but which had been frequently frustrated by illegal intrusions by other states, Congress specifically required the states of New Mexico and Arizona to refrain from exercising any jurisdiction or control over Indian Tribes or their property until the title to that property was extinguished and required the states to acknowledge that the absolute jurisdiction, which all parties understood to be exclusive, rested with Congress.[71]

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[71]Thus, the Senate Report on Statehood for New Mexico and Arizona provided

> "A final difference in the bills which your committee wishes to call attention refers to more careful safeguarding of the rights of Indians. . . . It is believed that the words inserted by the Senate Bill would more effectively provide against the introduction of liquor in the territory owned by these Indians and remove any uncertainty as to their lands being Indian country under existing laws." S. Rep. No. 454 61st Cong. 2nd Sess. at 31, 32 (1910).
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>
> "These changes have been inserted to safeguard the rights of any Indians who may have acquired title to their lands from a prior sovereignty, thus

(Cont.)

Subject to these conditions, and as a result of the com-

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effectually preventing their taxation." Id., at 33. (emphasis added)

Two decades earlier the House Committee on the Territories similarly viewed the purpose and effect of the same disclaimer language proposed for Washington, Montana, New Mexico Territory and the Dakotas.

> "Your committee desires to call attention to the fact that there are, in the territory of Dakota, large Indian Reservations, which by the terms of the bill are exempted from the jurisdiction of the proposed states .... This is more than one-fourth of the entire area of the Territory. . . . In view of the fact that these Indian lands are not open to settlement, are not subject to taxation, and remain within the exclusive control and jurisdiction of the United States, the area of Dakota upon which the state government can operate is reduced to 70,000,000 acres -- a less [sic] area than that of the State of Nevada." H.R. Rep. No. 1025, 50th Cong., 1st Sess., at 8-9 (1888).
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> * * * * *
>
> "In the northern portion of Montana there are numerous Indian Reservations, the lands within which are excluded from the operations of the bill and have not been subject to taxation by the Territorial government." Id. at page 10. (emphasis added)
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> * * * * *

Commenting on Arizona's enabling legislation, the Senate Committee on Statehood noted:

> "The purpose of this amendment is to maintain the status of the existing Indian reservations and allotments within the proposed state as Indian country within the meaning of the law prohibiting the introduction of liquor into Indian country." S. Rep. No. 454, 61st Cong., 2nd Sess. (1910) at pg.

(Cont.)

pliance with these conditions, Arizona and New Mexico were granted entry into the Union specifically subject to the provisions of the Enabling Act.

I. Federal, Tribal, State Jurisdiction: 1912 to 1983

Congress has continued to legislate in the area of Indian affairs. In 1934 it adopted the Indian Reorganization Act,[72] which, inter alia, acknowledged the power of Indian Tribes to veto the attempted disposition, lease or other assignment of Indian lands by the United States without Tribal permission. The Apache Tribes have adopted constitutions approved by the Secretary of Interior confirming that power. (T.A. at F. E)

In 1953 Congress passed Public Law 280,[73] and in 1968

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32. (emphasis added)

Moreover, the importance of the disclaimer language and the care with which it was fashioned was clearly evident in the commentary in the Senate Report.

> "Your committee cannot too earnestly call attention to the extreme care that should be taken with every provision of a bill like this .... Therefore, every line of it should be wrought out with painstaking care not required of any other form of legislation. Once passed, corrections of mistakes are impossible; once passed, it is beyond recall." Id., at 33-34.

[72] 48 Stat. 984, §16.

[73] Act of August 15, 1953, Pub. L. No. 83-280, 67 Stat. 588.

the Indian Civil Rights Act.[74] Both Acts expressly retain exclusive Federal jurisdiction over Tribes and their water rights.

II.

FEDERAL INDIAN LAW CONTROLS THE JURISDICTIONAL RELATIONSHIP BETWEEN THE UNITED STATES AND THE APACHE TRIBES AND EXCLUDES THE OPERATION OF STATE JURISDICTION OVER THE INDIAN TRIBES, THEIR RESERVATION PROPERTY AND THE UNITED STATES ACTING AS TRUSTEE FOR THAT PROPERTY.

The United States Constitution, the Apache Treaty, the 1934 Indian Reorganization Act, the Tribal Constitutions, Public Law 280, the 1968 Indian Civil Rights Act and the Federal Enabling Act are the primary elements of federal law which control the relationship between the United States and the Apache Tribe. As has been illustrated in the History discussion above, that relationship evolved as one which was exclusively between the United States and the Indian Tribes and has maintained its exclusive nature through the present.

The State of Arizona is not only bound by the Federal Enabling Act, which it has no power to change, but also by its own constitution. In the interpretation of those provisions, the State is bound by the rules of construction which have been

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[74] Act of April 11, 1968, Pub. L. No. 90-284, 82 Stat. 77.

developed over the 200-year period of the relationship between the Tribes and the United States in the interpretation of statutes affecting Indians.

A. The Proper Rule For Review And Construction Of Statutes Affecting Indians.

The settled principles governing resolution of this case are not new, for the "policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." McClanahan v. Arizona State Tax Comm'n., 411 U.S. 164, 168 (1973) (quoting Rice v. Olsen, 324 U.S. 786, 789 (1945)).

Federally recognized Indian Tribes exercise many of the characteristics of a totally immune soverign, including immunity from suit absent the Tribe's consent and the consent of Congress to waive such Tribal immunity. Puyallup Tribe v. Washington Game Dept., 433 U.S. 165, 167 (1977); Santa Clara Pueblo v. Marinez, 436 U.S. 49, 58 (1978).[75]

Although traditional notions of Tribal sovereignty, first enunciated in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832),

[75]Any consent by Congress to waive Tribal immunity from suit must be expressed and is never to be implied. Turner v. United States, 248 U.S. 354, 358 (1919); United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512 (1940).

have been modified by this Court "where essential Tribal relations were not involved and where the rights of Indians would not be jeopardized," Williams v. Lee, 358 U.S. 217, 219 (1959), "it would vastly oversimplify the problem to say that nothing remains in the notion that Reservation Indians are a separate people to whom State jurisdiction . . . may not extend." McClanahan v. State Tax Commission of Arizona, 411 U.S. 146, 170 (1973).[76]

Petitioners acknowledge that state laws are not applicable to Reservation Indians absent express Congressional consent. Pet. Brief at 30-31. However, they claim that the Ninth Circuit erred by refusing to apply the test of Williams v. Lee, 358 U.S 217, 220 (1959).

The Williams standard of analysis urged by Petitioners is inapplicable here[77] because the so-called Williams 'preemp-

[76]Thus, it is important to recognize that "Indian Tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." United States v. Mazurie, 419 U.S. 544, 557 (1975). See White Mountain Apache Tribe v. Bracker 448 U.S. 136, 142 (1980).

[77]For example, in Fisher v. District Court, 424 U.S. 382 (1976), involving state jurisdiction solely over Reservation Indians, the Court found the extension of state jurisdiction unlawful because it "plainly would interfere with the powers of self-government conferred upon the Northern Cheyenne Tribe." Id. at 387. The Court indicated, however, that the Williams test was applied there as a threshold inquiry, and was not to be (Cont.)

tion/self-government' test only applies in evaluating the propriety of state jurisdiction over of non-Indians on a Reservation[78] or state regulation of off-Reservation Indian activities.[79] It does not apply where, as in this instance, a state seeks to exercise jurisdiction over an Indian Tribe and its Reservation property, or the United States as trustee for its property. Rather, a more strict standard is applied. States may not exercise jurisdiction over Indians on an Indian Reservation "except where Congress has expressly provided that State laws shall apply." McClanahan, 411 U.S. at 170-71, quoting U.S. Dept. of the Interior, Federal Indian Law, 845 (1958). See, Bryan v. Itasca County, 426 U.S. 373, 377 (1976).[80]

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considered the 'litmus test' for judging the propriety of the state's jurisdiction over Reservation Indians. After indicating that the Williams test applied where state jurisdiction was asserted over non-Indians on the Reservation, the Court stated: "Since this litigation involves only Indians, at least the same standard must be met before state courts may exercise jurisdiction." Id. at 386 (emphasis added).

[78]See eg., White Mountain Apache Tribe v. Arizona, 649 F.2d 1274 (9th Cir. 1981); Williams v. Lee, 358 U.S. 217 (1959); White Mountain Apache Tribe v. Bracker, 448 U.S. at 144-45 (1980).

[79]See eg., Organized Village of Kake v. Egan, 369 U.S. 60 (1962).

[80]See also U.S. Dept. of the Interior, Federal Indian Law, 363 (1958); Cohen, Handbook of Federal Indian Law, 117 (1942).

> "[T]he establishment of an Indian Reservation in and of itself has the effect of preempting state jurisdiction within the Reservation over Indians,

(Cont.)

The controlling test is whether Congress has expressly repealed the Tribes' Treaty and the Federal Enabling Act and authorized Arizona to apply its laws to the respondent Indian Tribes and their Reservation property. In resolving this issue recent cases have focused on all applicable history, treaties and federal statutes, including statehood enabling legislation, viewed against the traditional "backdrop" of Indian sovereignty. McClanahan, 411 U.S. at 172-74. See Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973). Our analysis similarly begins with the applicable treaty.

B. The Treaty With The Apache Nation

In 1852 representatives of the Apache Nation, including ancestors of the Apache Respondents, executed a Treaty with the United States, wherein the Apache Nation agreed to submit itself to the exclusive jurisdiction of the federal government. Article I of that document provides that the Apache Nation is "lawfully and exclusively under the laws, jurisdiction, and government of the United States of America." Treaty with the Apaches, July 1, 1852, 10 Stat. 979 (1852) (emphasis added). Article IX obligated the United States to "designate, settle and

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Indian Tribes and Indian property." Cohen, Handbook of Federal Indian Law, 583 (1982).

adjust [the Tribe's] territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians."

It has been recognized, without exception since the era of the Marshall Court, that Indian treaties and legislation are to be liberally construed in order to further Indian interests. See Bryan v. Itasca County, 426 U.S. 373, 392 (1976); McClanahan v. Arizona State Tax Commisssion, 411 U.S. at 174; Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582 (1832). Moreover, in this instance, the Treaty expressly dictates a "liberal construction, at all times and in all places, to the end that . . . the Government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians." Treaty with the Apaches, Article XI. (emphasis added).

Because of its dispositive holding on the disclaimer issue, it was unnecessary for the Ninth Circuit to reach several issues raised by the Tribes, including the issue of exclusive federal jurisdiction based upon the express language of this Treaty. Nonetheless, for purposes of the present review, the Treaty's language of exclusivity combines with traditional notions of Tribal sovereignty and other Federal Indian law to

provide the proper "backdrop" for examining the effect of Arizona's Enabling Act and Constitutional disclaimer which placed Indian lands "under the absolute jurisdiction and control of the Congress of the United States."[81]

The Ninth Circuit did hold in San Carlos, however, that Arizona did not have subject matter jurisdiction to adjudicate Tribal rights to Reservation waters, notwithstanding the waiver of soverign immunity by the United States through the McCarran Amendment,[82] because the State had agreed, as a condition to its admission to the Union, to "forever disclaim all right and title . . . to all lands lying within said [Reservation] boundaries owned or held by any Indian or Indian Tribe," and further, that "until the title of such Indian or Indian tribes shall have been extinguished" the land shall "remain subject to the disposition and under the absolute jurisdsiction and control of the Congress of the United States . . . . " Ariz. Const. Art. XX, § Fourth. According to the Ninth Circuit:

"A valid exercise of state jurisdiction requires that

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[81] The singular importance of the treaty's exclusivity language, clearly stated in express terms in Article I and strongly implied in Articles IV, IX, X and XI, cannot be over-emphasized, for it fundamentally distinguishes the instant case from every decision Petitioners rely upon.

[82] 43 U.S.C. §666.

> the State have both personal and subject matter jurisdiction. Via the McCarran Amendment, the United States has waived sovereign immunity from suit in certain cases involving water rights . . . . However, whenever a state has chosen to disclaim subject matter jurisdiction over Indian water rights, the combination of jurisdictional prerequisites necessary for a state court to hear a challenge to Indian water rights would appear to be lacking."

Adsit, 668 F.2d at 1085; Pet. App. at C-7.

Petitioners claim that Arizona's disclaimer is not jurisdictional and only bars the State itself from claiming a "proprietary" or ownership interest in Reservation property. Pet. Brief at 25-26. In addition, Petitioners construe McCarran as a "grant of state court jurisdiction" and argue that the Ninth Circuit's holding creates an "exception" to this grant of subject matter jurisdiction over Reservation water rights. Pet. Brief at 16. (emphasis added).

C. The Arizona Enabling Act

The Ninth Circuit recognized the critical distinction drawn repeatedly by this Court between (1) a state's limited power to regulate non-Indians on the Reservation or Indians off the Reservation, and (2) a state's total lack of authority to assert jurisdiction over a Tribe and its Reservation property. In arguing that Arizona's disclaimer is not jurisdictional, Peti-

tioners criticize the court. See Pet. Brief at 30.

According to the Ninth Circuit, a

> "State may have a strong governmental interest that empowers it to regulate certain limited conduct concerning non-Reservation Indians or non-Indians on Reservations .... [But] the power of a Court in a disclaimer state to enforce a regulatory statute that may adversely affect Indians falls far short of the power to adjudicate a direct challenge to Indian water rights in and to the waters of streams. A disclaimer state cannot assert jurisdiction over such matters until Indian soverign immunity has been waived and the state has repealed its disclaimer. Unless the state effectively repeals its disclaimer, it cannot hear this matter." Adsit, Pet. App. C-11, 668 F.2d at 1087.

The Ninth Circuit's ruling that Arizona's constitutional disclaimer is in fact 'jurisdictional' and constitutes a 'legal impediment' to state jurisdiction over Tribal Reservation property is consistent with prior decisions of this Court[83] and supported by the express legislative history and intent of the disclaimers.

In Washington v. Yakima Indian Nation, 439 U.S. 463, 474 (1979), the Court indicated that in the absence of a repeal, Washington's constitutional disclaimers were "organic law disclaimers of [state] jurisdiction over Indian country." Moreover,

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[83] See, Memorandum For The United States at 9-11.

the Court went on to quote from a House Report discussing the effect of such disclaimers.

> "According to this report accompanying H. R. 1063 (the House version of Pub. L. 280) '[e]xamination of the federal statutes and state constitutions has revealed that enabling acts for eight states, and in consequence the constitutions of those states, contain express disclaimers of jurisdiction. Included are Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah and Washington.'"

Id. at 481, quoting H. R. Rep. 848, 83rd Cong., 1st Sess. 6 (1953). (emphasis added).[84]

That the disclaimers are in fact barriers to state jurisdiction over Tribes and Reservation property was again made clear in McClanahan:

> "Congress has consistently acted upon the assumption that the states lacked jurisdiction over Navajos living on the Reservation. Thus, when Arizona entered the Union, its entry was expressly conditioned on the promise that the state would 'forever disclaim all right and title to [Indian lands] . . . and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain under the absolute jurisdiction and control of the Congress of the United States.'"

McClanahan, 411 U.S. at 175 (emphasis added).

And in Williams v. Lee the Court earlier construed

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[84] See, H. R. Rep. 848, 83rd Cong., 1st Sess. 6 (1953) (wherein disclaimers, such as Arizona's, were referred to as "organic laws expressly disclaiming jurisdiction").

Arizona's constitutional disclaimer as an "express disclaimer of jurisdiction over Indian lands." 358 U.S. at 223 n.10 (emphasis added).[85]

Finally, in Chino v. Chino, 90 N.M. 204, 561 P.2d 476 (1977), the New Mexico Supreme Court held that New Mexico lacked subject matter jurisdiction over a forcible detainer suit against a Reservation Indian, an action dealing "directly with the question of . . . ownership of land." Although the state did not claim ownership of the land, the court held that the Apache Treaty,[86] applicable here as well, together with the New Mexico Enabling Act and Constitution which "disclaimed jurisdiction over Indians," combined to "preclude the state from exercising jurisdiction over [an action involving] property lying within the Reservation boundaries." 561 P.2d at 479 (emphasis added).

The history of federal experience in the Territories and the intrusion into the exclusive federal jurisdiction by the

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[85] In discussing the incapacity of states to assert jurisdiction over Reservation Indians, a preeminent Indian law scholar concluded: "One of the most persuasive considerations as to the lack of state power is the inclusion in enabling acts and state constitutions of express disclaimers of state jurisdiction over Indian lands." Cohen, Handbook of Federal Indian Law, 116 (1942).

[86] Treaty With The Apaches, July 1, 1852, 10 Stat. 979 (1853).

States makes it clear that the Arizona Enabling Act requires a disclaimer of governmental jurisdiction by the states and retains that jurisdiction exclusively in the United States.

Congress required placement of the disclaimer language in Arizona's Constitution as a condition to statehood, and the conditions "positively preclude the making of any future constitutional amendment of any change or abrogation of the said ordinance in whole or in part without the consent of Congress"[87]. It is much more than a mere "acknowledgement" that the state could not claim a proprietary or ownership interest in Reservation lands.

Since naked fee title to Reservation land was owned by the United States prior to statehood, and Arizona, by virtue of a separate provision of the Enabling Act,[88] was expressly precluded from claiming Reservation lands as statehood grant lands, the disclaimer of "jurisdiction and control" would be utterly superfluous if in fact it was meant to have the effect Petitioners' claim.

Pursuant to §29 of the Enabling Act, Arizona was authorized to select large tracts of United States land for transfer

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[87] 36 Stat. 568-79, §20 (last paragraph).
[88] 36 Stat. 568-79, §29.

to state ownership, but only lands "from the surveyed, unreserved, unappropriated and non-mineral public lands of the United States . . ." (emphasis added). Since Indian Reservations in Arizona were "reserved" and were not "public lands of the United States",[89] §29 itself effectively precluded the state from claiming title to Indian lands and established that the state had no proprietary interest in those lands because title remained in the United States and the Indian Tribes.

The disclaimer language in §20 of the Enabling Act is not surplusage, but was in fact intended to be an organic legal impediment which bars Arizona from subjecting Indian tribes and their Reservation lands to state jurisdiction of any kind.

Petitioners claim that the Ninth Circuit construed the Arizona disclaimer's "absolute jurisdiction and control" language to mean 'exclusive' Federal jurisdiction. They claim that the Court's interpretation 'departs radically' from this Court's decision in Organized Village of Kake v. Egan, 369 U.S.

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[89] See, e.g., Executive Order of Dec. 14, 1872, which established the San Carlos Reservation and provided that such lands were to be "withheld from sale and set apart as a reservation." Later, in a series of subsequent Executive Orders, certain portions of the San Carlos Apache Reservation were "restored to the public domain", thereby becoming again public lands.

60 (1962). No such departure exists. The Ninth Circuit did not hold that "absolute" meant "exclusive" or that the disclaimer barred the possibility of concurrent state jurisdiction over non-Indians on Reservations or off-Reservation Indians. And Kake did not hold that "absolute" never meant "exclusive" federal jurisdiction over Reservation Indians and their Reservation property.[90]

The issue in Kake was whether Alaska's disclaimer[91] prevented the state from enforcing its fish conservation laws against Tribes fishing in off-Reservation waters. After reviewing the unique history of the Alaskan Indians[92] and the

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[90] This Court has often repeated the basic rule of law laid down by the founders, which is " . . . the plenary and exclusive power of the Federal Government to deal with Indian Tribes." Bryan v. Itasca County, supra, at 376, n. 2. As Justice Rehnquist stated in a unanimous opinion, "There is thus no doubt that this case is properly analyzed in terms of Congress exclusive constitutional authority to deal with Indian Tribes." United States v. Mazurie, 419 U.S. 544, 554, n.11.

[91] Alaska Statehood Act, 72 Stat. 339 (1958), as amended by 73 Stat. 141 (1959).

[92] The unique history of Alaskan Indians was analyzed in Kake and more fully in its companion case, Metlakatla Indian Community v. Egan, 369 U.S. 45, 48-51 (1962). The two Tribes in Kake did not reserve reservations for themselves within their aboriginal territory, nor did the United States establish Reservations for them. Kake at 62. In contrast, all Arizona Respondents have permanent tribal homelands reserved for their exclusive use. Moreover, Alaskan Indians were never at war with the settlers in the hostile and isolated environment experienced by many Arizona Tribes. Metlakatla, at 50-51. (Cont.)

legislative debate surrounding the Alaskan disclaimer, the Court held that the jurisdictional disclaimer did not bar the state from regulating such off Reservation fishing.

The conclusion in Kake that Alaska's disclaimer of "right and title" was of 'proprietary interests' was based primarily on Senate Committee Hearings on the Alaska Statehood Act.[93] The Court construed the meaning of the Alaskan disclaimers "in light of the circumstances of its formulation and enactment," Kake, 369 U.S. at 65 (emphasis added), circumstances vastly different from those surrounding passage of Arizona's disclaimer one-half century earlier.[94] The ruling was not derived from the express words of the disclaimer, or

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The Reservations for most Arizona Tribes, and specifically the Apaches, were set aside in remote areas to protect them from further encroachment from the settlers, and to prevent such encroachment from resulting in war. Thus, unlike Arizona's history, there were never "Indian wars" in Alaska and the Federal Government made no attempt to "isolate" Alaskan Tribes on Reservations. Id. Consequently, for many years prior to Alaskan statehood, Indians there had substantially adopted and been accepted by the non-Indian civilization in the territory. The history of Alaskan Tribes is so vastly different that courts have held that Tribes there are denied the protections of Indian national sovereignty discussed in Worcester v. Georgia, 6 Pet. 515 (1832). Metlakatla, at 50-51.

[93]Hearings before Senate Committee on Interior and Insular Affairs on S. 50, 83rd Cong., 2d Sess. (1954). See Kake, 369 U.S. at 69-71.

[94]See Memorandum for the United States at 32 n. 17.

by any meaning implied therefrom. Moreover, the Court did not review the legislative history of any other disclaimers.[95]

In discerning Congressional intent behind the words "absolute jurisdiction and control" appearing in Alaska's Statehood Act, Kake found controlling the statements of two Senators who commented on the purpose of that Act.

> [Alaska] may well waive its claim to any right or title to the lands and still have all of its political or police power with respect to the actions of the people on those lands, as long as that does not affect the title to the land. . . . The act of admission gives to the State of Alaska political jurisdiction . . . unless there be express or definitely implied . . . a Reservation of exclusive

[95]Overlooking this fact, the Tenth Circuit in Jicarilla Apache Tribe v. United States, 601 F.2d 1116 (10th Cir. 1979) cert. denied, 444 U.S. 995 (1979), concluded that since the language of the New Mexico and Alaska disclaimers was similar, the Kake holding applied as well to the New Mexico disclaimer. Jicarilla even went so far as to quote Kake wherein the Court discussed the detailed legislative history behind the Alaska Statehood Act. Id. at 1133. Jicarilla made no independent analysis of the New Mexico disclaimer enacted nearly a half century earlier. Since the distinction between governmental and proprietary interests drawn by Kake emanated solely from the statements of unique legislative debates concerning the Alaska Statehood Act, Jicarilla's singular reliance on Kake as authority for interpreting legislative intent behind New Mexico's disclaimer was improper, particularly in light of the Tenth Circuit's acknowledgement, based on McClanahan v. State Tax Comm'n. of Arizona, 411 U.S. 164, 175 n. 15 (1973), that Kake "did not purport to provide guidelines for the exercise of state authority in areas set aside by treaty for the exclusive use and control of Indians." See, Jicarilla, 601 F.2d at 1134. See, Chino v. Chino, 561 P.2d 476, 478 (N.M. 1977).

jurisdiction in the United States. (Senator Cordon)

* * *

All that you are doing here is a disclaimer of proprietary interest. (Senator Jackson)

Kake, 369 U.S. at 69, 70 (emphasis added), quoting Hearings before Senate Committee on Interior and Insular Affairs on S. 50, 83rd Cong., 2d Sess. (1954).[96]

There is a marked and far-reaching temporal and factual difference between the history of Tribes in Arizona prior to 1910 and that of Alaskan natives in 1958.[97] It is this contrast which accounts for the dissimilarity in Congressional purpose behind the enabling acts of both states.

In Metlakala Indian Community v. Egan, 369 U.S. 45, 50-51 (1962), the Court observed that very few Reservations were ever established in Alaska because Indians there were "never in the hostile and isolated position of many tribes in other states." Moreover, the purpose for which these few Reservations were created, "in marked contrast to many other states,

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[96] Even assuming the purpose behind the Enabling Acts of Alaska and Arizona were identical, which is not the case, Arizona's adjudication of reservation property would still contravene the disclaimer clause since it affects title to property on reservations established for the exclusive use of all Respondent tribes.

[97] See, note 92, supra.

was not to confine the Indians for the protection of white settlers but to safeguard the Indians against exploitation". Id.

As a result, vast numbers of Alaskan Indians, Eskimoes and Aleuts occupied not reserved lands set apart from the public domain, but rather the unreserved public domain under claims of aboriginal title or mere occupancy. See Kake, 369 U.S. at 67. Unlike Arizona's enabling act, the enabling act for Alaska allowed the state to select large tracts of land for state ownership, including lands theretofore occupied by Alaskan natives. Id. at 65, 66.[98]

Interpreting the "disclaimer of right and title" language, Kake considered relevant the manner by which the state would select United States lands. The Court found that:

> The disclaimer of right and title by the state was a disclaimer of proprietary rather than governmental interest. It was determined, after some debate, to be the best way of insuring that statehood would neither extinguish nor establish claims by Indians against the United States. If land subject to the claim of Indian rights were transferred to the state, the Indians were not thereby to lose the right to make claims against

[98]The Court observed that "[Congress] understood that the disclaimer provision left the state free to choose Indian 'property' if it desired, but that such a taking would leave unimpaired the Indian's right to sue to the United States for any compensation that might later be established to be due." Kake, 369 U.S. at 65, 66.

the United States for damages.

Kake, 369 U.S. at 69. By contrast, in Arizona, where Tribes had for years prior to statehood been isolated on Reservations, the state was precluded from selecting those reserved, non-public lands by virtue of Section 29 of the Arizona Enabling Act.

It is also important to note that not all Alaskan Indian lands could be selected for state ownership. After statehood there remained a checkerboard pattern of non-Reservation lands occupied by Indians, the title to which was not derived from the United States. Therefore, Alaska's disclaimer, unlike Arizona's, was expressly made applicable to Indian lands, the right or title to which may be held by the United States and "by any Indians, Eskimos, or Aleuts." 72 Stat. 339, §4.

As a result of the checkerboard pattern of individual Indian ownership, Alaska's disclaimer was meant to protect that ownership by prohibiting Alaska from claiming any proprietary interest in that land after statehood, and yet allowing the state to assert its "governmental" interest over the "checkerboard" of Indian lands.

By contrast, Indians in the other 10 disclaimer states, particularly Arizona, were largely confined to Reservations

when their disclaimer provisions were drafted in the 21 years from 1889 to 1910.[99] To insure that federal jurisdiction over Reservation Indians and their Reservation property would remain exclusive and that the states would not extend jurisdiction to the Reservation, be it 'proprietary,' 'governmental' or otherwise, the disclaimers were made a mandatory condition to statehood. That the disclaimers in these states retained exclusive federal jurisdiction over Reservations is clear.

A report from the House Committee on the Territories explained the effect of the disclaimer language in the bill to admit North Dakota, South Dakota, Montana and Washington to enter the Union, stated:

> "Your committee desire to call attention to the fact that there are in [these territories] large Indian reservations, which by the terms of the bill are excluded from the jurisdiction of the proposed State. . . . [T]hese Indian lands are not open to settlement, are not subject to taxation, and remain within the exclusive control and jurisdiction of the United States." (Emphasis added)

H. Rep. 1025, 50th Cong., 1st Sess. (1888) at 8-9. More recently, Congress has had occasion to construe such disclaimers.

In 1953 Congress specifically reviewed the status of

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[99] See, Memorandum for the United States at 12 n. 18.

state jurisdiction in matters affecting Indians. In the report, the House of Representatives stated that examination of the disclaimers in the states whose provisions were drafted from 1889 to 1910 revealed that the

> "[E]ffect of the disclaimer of jurisdiction over Indian land within the borders of these states — in the absence of consent being given for future action to assume jurisdiction — is to retain exclusive federal jurisdiction until Indian title in such lands is extinguished . . . ." (Emphasis added)

H. Rep. 848, 83rd Cong., 1st Sess. (1953) reprinted in [1953] U.S. Code Cong. & Admin. News at 2412.

The clear distinction between the congressional intent behind the original 10 disclaimers and that of Alaska makes the Court's holding in Kake irrelevant and inapplicable to this case. Moreover, Kake, which concerned state jurisdiction over Indians off the Reservation, does not control where the Enabling Act and Arizona's constitutional disclaimers preclude the state from asserting personal jurisdiction directly over the Respondent Tribes and the United States as its trustee and subject matter jurisdiction over the Tribes' Reservation property rights. As was emphasized in Kake itself:

> "Even where reserved by Federal treaties, off-Reservation hunting and fishing rights have been held subject to State regulation, Ward v. Racehorse, 163 U.S. 504; Tulee v. Washington,

315 U.S. 681, in contrast to holdings by State and Federal Courts that Washington could not apply the laws enforced in Tulee to fishing within a Reservation, Pioneer Packing Co. v. Winslow, 159 Wash. 655, 294 P.557; Moore v. United States, 157 F.2d 760, 765 (Ca. 9th Cir.) See State v. Cooney, 77 Minn. 518, 80 N.W. 696."

Kake, 369 U.S. at 75.

The importance of the on Reservation/off Reservation distinction in analyzing the authority of a disclaimer State to assert subject matter jurisdiction over Indian Tribes and their Reservation property was stressed again in McClanahan v. State Tax Commission of Arizona, 411 U.S. 164 (1973), where the Court acknowledged Kake's narrow holding.

"There is nothing in Organized Village of Kake v. Egan, 369 U.S. 60, 82 S. Ct. 562, 7 L. Ed. 2d 573, (1962) to the contrary. In Egan, we held that "'absolute' Federal jurisdiction is not invariably exclusive jurisdiction," and that this language in Federal legislation did not preclude the exercise of residual State authority. See Id. at 68, 82 S. Ct. at 567. But that holding came in the context of a decision concerning the fishing rights of non-Reservation Indians. See Id. at 62, 82 S. Ct. at 564. It did not purport to provide guidelines for the exercise of State authority in areas set aside by treaty for the exclusive use and control by Indians."

McClanahan, 411 U.S. at 175 n.15 (emphasis in original). See also Id. at 168-69; Mescalero Apache Tribe v. Jones, 411 U.S. 145, 147-49 (1973).

Arizona is here attempting to assert jurisdiction directly over the Tribes and the rights of the Tribes to property on their Reservations established for their exclusive use within the Tribe's larger aboriginal territory. Failing that, the state would accomplish the goal indirectly through the Trustee, United States. As the Ninth Circuit correctly ruled, Kake does not authorize it: McClanahan and Arizona's disclaimers prohibit it.

D. No Statute Cited by Petitioners Upholds Their Representation to This Court That Congress Has Authorized the Assumption of Jurisdiction Over Indian Reservations for Disclaimer States Without the Requirement of an Amendment to the Enabling Act or State Constitution.

Petitioners cite several federal statutes which they claim extend state jurisdiction "to Indians and their Reservations without regard to the presence of the disclaimers." Pet. Brief at 22-24. (emphasis added). None of the statutes cited by Respondents authorize State regulation of Reservation Tribes or their property by disclaimer states.

Petitioners argue that 18 U.S.C. §1161 permits the sale of liquor on all Indian Reservations "subject to State law." This statute delegated authority to regulate liquor on the Reservations to the Indian Tribes themselves, not to the States. See United States v. Mazurie, 419 U.S. 544, 547 (1975). Tribes

and their Reservations were not made "subject to State law" under the statute, nor was general enforcement authority conferred on the States.[100]

Petitioners cite 25 U.S.C. §311. This section merely gave the Secretary of Interior permission to grant states easements to construct Reservation roads under rules and regulations promulgated by the Secretary of Interior. It did not grant states jurisdiction.[101]

Petitioners also cite 25 U.S.C. §398, but this statute merely authorizes states to tax the "production of oil and gas and other minerals" by non-Indian lessees. It does not author-

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100 United States v. New Mexico, 590 F.2d 323, 329 (10th Cir. 1978) cert. denied, 444 U.S. 832 (1979). ("We cannot perceive any semblance of support for the state's position that Congress intended to empower it to regulate the liquor traffic on Indian reservations."); accord, Rehner v. Rice, 678 F.2d 1340, 1343 (9th Cir. 1982) (appeal pending). See also 78 Interior Dec. 39 (1971).

In addition to the disclaimer of jurisdiction appearing in Arizona's Constitution, Congress required the state to insert a constsitutional provision prohibiting introduction of liquor onto Indian reservations. As with the jurisdictional disclaimers, that provision could not be amended or repealed without the consent of Congress. Congress consented to amendment of this section in 1954, Act of August 15, 1953, c.502, 67 Stat. 586, and Arizona amended the provision by referendum election on November 2, 1954.

101 See Application of Denetclaw, 83 Ariz. 299, 320 P.2d 697 (1958); State v. Begay, 63 N.M. 409, 320 P.2d 1017, cert. den. 357 U.S. 918 (1958); Enriquez v. Superior Court, 115 Ariz. 342, 565 P.2d 522 (1977).

ize the taxation of Indians. Moreover, §398(c) expressly provides that "such taxes shall not become a lien or a charge of any kind against the land or other property of such Indians."

Contrary to the claim of Petitioners, 25 U.S.C §1300(f) was not a grant of jurisdiction to Arizona over a Federally recognized Indian tribe. An Arizona corporation formed by Pasqua Yaquis owned fee simple title to land in southwestern Arizona. This privately owned parcel had been subject to state jurisdiction prior to enactment of §1300(f). The statute merely made members of that corporation eligible for those services and assistance provided to Federally recognized Indian Tribes. Upon request of the corporation, the statute authorized the Secretary of Interior to accept on behalf of the United States title to the property. Eligibility of the Pasqua Yaquis for Federal assistance, however, was expressly made contingent upon Arizona retaining the civil and criminal jurisdiction that it had previously been asserting over the individual Indians and the corporate-owned land.

25 U.S.C. §416(a)(b) permitted Arizona to enjoin health hazards located on Reservation lands leased to non-Indians. The section does not grant states authority over Tribes or their Reservation property. Similarly, 25 U.S.C. §231 is not an

example of state jurisdiction over Tribes or Reservation property. The statute authorizes the Secretary of the Interior, under rules as he may prescribe, to allow state employees to enter Reservations for health inspections and to enforce compulsory school attendance requirements. Enforcement of school attendance is conditioned upon Tribal consent, and state health regulations "may not be applied to Indians if their enforcement, directly or indirectly, would impact or involve the regulation of trust property in any significant way."[102]

Finally, Petitioners cite 25 U.S.C. §642(b). This section does not confer upon Arizona any authority over the Hopi Tribe or Reservation property. The statute extends to the Hopi Tribal Council certain powers, one of which would allow mortgaged Industrial Park lands to be subject to foreclosure "in accordance with the laws of the State of Arizona." The land is located within the city of Winslow and was never, at any time, a part of the Hopi Reservation. Private parties conveyed the land to a title company, which conveyed it to the Hopi Tribe,[103] subject specifically to the condition that it be devel-

[102]Opinions of the Solicitor, Department of the Interior, No. M-36768, Feb. 7, 1969.

[103]Special Warranty Deeds from Arizona Title Insurance and Trust Company, as Trustee, the Grantor to the United States (Cont.)

oped as an industrial park. To encourage industrialization, Congress made the parcel non-taxable.[104] Title was taken in trust by the United States as a matter of convenience and protection for this newly acquired Tribal asset. Thus, Arizona previously had jurisdiction over the private land and merely retained it upon transfer to the Tribe. Since it was not within the Reservation, no amendment of the Enabling Act or Arizona Constitution was required.

Contrary to the claims of Petitioners, none of these statutes authorize Arizona jurisdiction over Reservation Indians or their property. One principal, however, is made clear. When Congress approaches the subject of Indian property and its relationship to states, it does so expressly and specifically. Even then, Congress demonstrates its traditional preference for Federal Court in matters involving Indians.

E. A Suit Against The Trustee Does Not Negate The Bar Of The Federal Enabling Act And State Constitution.

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of America, as Trustee for the Hopi Indian Tribe, Grantee, dated February 2, 1976 and recorded at Docket 254, page 161 and Docket 271, page 638 and the Indenture (Quit Claim Deed) from the Santa Fe Pacific Railroad Company to the United States of America, in Trust for the Hopi Indian Tribe, dated October 14, 1966 and recorded at Docket 271, pages 636, 637, Records of the County Recorder, Coconino County, Arizona.

[104] See also, Solicitor's Opinion, M-33603, April 4, 1944.

Petitioners claim that Arizona's disclaimer is "irrelevant" because joinder of the United States as trustee for the Tribe's water rights does not "conflict with the disclaimer as to Indian lands."[105] The argument is untenable.

First, Arizona's disclaimer applies to both Indians and Indian property. Even if the adjudication were solely against the United States as "owner" of a "naked fee" as trustee for reserved rights, the adjudication would still contravene the disclaimer as an unlawful assertion of jurisdiction over Indian property. In addition, the Apache Treaty mandates that Reservation property is to remain under exclusive federal jurisdiction.[106]

Second, Arizona's water statutes require joinder of beneficial owners of water rights. A.R.S. §45-253(A)(2) requires "service on all known potential claimants." 'Potential claimant' is defined as "all persons claiming water rights or on whose behalf claims to water rights are asserted." A.R.S. §45-251(3). "Person" is defined to include "Indian Tribe or Community." A.R.S. §45-251(2), (JA 119) Thus, the statutes require

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[105]Pet. Brief at 20.
[106]See, Apache Treaty, Art. 1, 9, 11 (TA G-1, -3).

joinder of the Tribes[107]

Finally, representation by the United States as trustee in the pending State Court adjudications is prohibited because of the blatant conflict of interest between the proprietary interests of the United States and the Respondent Tribes, and the conflict of the Trustee representing a great number of Indian Tribes competing for water from the same sources. Since the law relating to the conflict of interest between the United States and Indian Tribes has been fully briefed by the Montana Respondent Tribes, the San Carlos and Tonto Apache Tribes incorporate herein that section of the Brief of the Montana Tribal Respondents.[108]

The factual setting for the conflict of interest between the United States and Arizona Tribes is extraordinary. In the pending state adjudications as joined by the Arizona Supreme Court, the United States is to assert on its own behalf water

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[107]Petitioners gloss over the fact that the Tribes were allegedly "served" for the purpose of making them parties. The relief Petitioners request, reversal of the Ninth Circuit and affirmance of the district court's order, would require the Tribes to either appear on their own behalf in state court or forfeit their water rights. See, (JA 8, 15); A.R.S. §45-254(E) (JA 123).

[108]See, Brief of Montana Tribal Respondents, Section III(D) entitled "Montana State Court Proceedings Are Inadequate To Resolve The Indian Claims."

rights for at least four military reservations,[109] five national forests[110], and separately on behalf of at least ten individual Indian Tribes[111]. This diversity of federally reserved lands also illustrates the substantial federal interest in the Arizona proceedings, in contrast to Akin, where the federal interest was minimal and the United States could there act as trustee without conflict of interest. See Adsit, 668 F.2d 1080, 1090 (9th Cir. 1982); Pet. App. C-16.[112]

The disclaimer is not 'irrelevant,' as Petitioners charge. The disclaimer is legislation enacted for the benefit and protection of Indian Tribes and their property. It would

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[109]The military reservations are: Fort Huachuca, Davis Monthan, Williams and Luke Air Force Base.

[110]The National Forests are: Tonto, Sitgreaves, Coronado, Apache and Prescott.

[111]The Indian Reservations are: Fort McDowell Mohave-Apache Community; Gila River Indian Community; Papago Tribe; Salt River Pima-Maricopa Indian Community; San Carlos Apache Tribe; White Mountain Apache Tribe; Yavapai-Prescott Indian Community; Yavapai Apache Indian Community at Camp Verde; and the Tonto Apache Tribe. In addition, a number of Federal Reclamation Projects will claim water from these sources and they have urged in the past the United States has a trust responsibility to them.

[112]Moreover, there are numerous federal irrigation projects with whom the United States has contractual obligations and responsibilities. Included are: The Salt River Project, Central Arizona Project, Roosevelt Irrigation District, and Buckeye Irrigation District, among others. Some of these entities have claimed that the United States owes to them certain trust responsibilities.

indeed become irrelevant, and its purpose thwarted, were joinder of the United States under these circumstances sufficient for Arizona to obtain subject matter jurisdiction over the diverse and conflicting water rights of Arizona Tribes.

F. Other Federal Law and the Constitutions of the Tribes.

Such an interpretation also frustrates the intent of other federal law enacted for the benefit of Indians.

Federal law authorizes Tribes organized under the Indian Reorganization Act, 48 Stat. 987 (1934), 25 U.S.C. §461, et seq., to veto any "sale, disposition, lease or encumbrance of Tribal lands, interest in land or other Tribal assets without the consent of the Tribe." The San Carlos Apache Tribe and the Tonto Apache Tribe have enacted Constitutions, pursuant to 25 U.S.C. §476.[113] Both Constitutions permit the Tribes to manage their own affairs so long as it does not conflict with the laws of the United States. Tribal authority extends to all the territory within the Reservation and to all lands which the Tribe may acquire for itself, and all matters concerning the welfare of the Tribe. The Tribes may veto the sale, disposi-

[113]The Amended Constitution of the San Carlos Apache Tribe, TA E-1; the Constitution of the Tonto Apache Tribe (formerly known as the Payson Community of Yavapai Apaches), TA B-1.

tion, lease or encumbrance of Tribal lands, interest in lands, Tribal funds or other Tribal assets that may be authorized by any employee of the government. It also authorizes the Tribes to protect and preserve the wildlife and natural resources, to regulate hunting and fishing and the uses and disposition of Tribal property. The San Carlos Constitution provides that relinquishments of any water right requires a special Tribal election. The Tonto Apache Constitution provides that the Tribe has the power "[t]o manage, protect and preserve all lands, minerals, water, wildlife and other natural resources of the lands held by the Tribe." The Federal government has agreed by the statute and the approval of these constitutions that it alone cannot effect a disposition of the Reservation property of the Tribe, in Federal Court or otherwise.

These requirements of federal law remain unimpaired by any waiver of immunity by the United States through McCarran. It is equally clear that joinder of the United States alone is insufficient to reach the water rights of the Tribe.

G. The McCarran Amendment Was Not A Grant Of Jurisdiction To The States.

Respondents Apache Tribes incorporate herein by reference the argument addressing the McCarran Amendment

as set forth in the brief of the Tribal Respondent, Salt River Pima-Maricopa Indian Community, entitled "THE McCARRAN AMENDMENT DID NOT AFFECT THE ENABLING ACT." The Respondent Apache Tribes offer the following additional material.

McCarran waived the sovereign immunity of the United States, which permits personal jurisdiction over the federal government in comprehensive water adjudications in courts "having jurisdiction".[114] The Amendment did not grant state courts subject matter jurisdiction over Reservation water rights, nor did it waive the requirement for Tribal consent as required by the constitutions of the Tribes and the 1934 Indian Reorganization Act.[115]

The Senate Report on the McCarran stated that the limited purpose of the legislation was "to permit joinder of the United States as a party defendant in any suit for the adjudication of rights to the use of water." S. Rep. 755, 82d Cong., 1st Sess. 2 (1951). McCarran is nothing more than that. It was "not intended to be used for any other purpose than to allow

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[114] See United States v. District Court for Eagle County, 401 U.S. 520, 523 (1971); United States v. District Court in and for Water Div. 5, 401 U.S. 527, 529 (1971).

[115] 48 Stat. 984.

the United States to be joined in a suit." Id. at 9 (letter of Senator McCarran). It was clearly not a grant of jurisdiction.

The consent to joinder and waiver of sovereign immunity is expressly limited. McCarran provides that the United States shall only be "subjected to the judgments, orders, and decrees of the court having jurisdiction." 43 U.S.C. §666(a) (emphasis added). Referring to this clause, one court has stated:

> "General reference only is made to 'the court having jurisdiction.' It follows that this statute is one simply waiving the immunity of the United States from suit in the class of actions specified, and that, apart from this, it does not purport to be a grant of jurisdiction to any particular court or courts, state or federal."

In re Green River Drainage Area, 147 F. Supp. 127, 134 (D. Utah 1956).

While Petitioners assert that McCarran was a grant of subject matter jurisdiction to state courts, they are forced to acknowledge McCarran's narrow purpose of waiving the sovereign immunity of the United States. Pet. Brief at 14, 17. Petitioners, therefore, are forced to claim that the adjudication of Reservation water rights by Arizona is still permissible under McCarran because the state always has enjoyed the power to exercise subject matter jurisdiction over Tribal

Reservation property. Pet. Brief at 26. Consequently, they conclude that since Arizona is providing "only the procedural framework" for others to claim ownership of waters flowing on the Reservations, the state may assert its "paramount . . . governmental interest" by subjecting "Indian rights to legal challenge" in state courts.[116] Pet. Brief at 26, 31. The origin of this jurisdiction which the State claims it has "always" had is a mystery which will remain unexplained, even in the Reply of the Petitioners.

Petitioners do not dispute that McCarran, on its face, makes no mention of Indians, Indian Tribes, independent Tribal water rights, Federally reserved water rights on behalf of Indian Tribes or State Court jurisdiction. Instead they rely on a fragile structure of "legislative history" to show Congressional intent to grant States jurisdiction over Indian Tribes. Such reliance is unjustified where the language of the statute itself is clear and unabmiguous on its face. Monte Vista Lodge

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[116]Since Petitioners urgue that Arizona has always had the power to assert its "governmental interest" jurisdiction over Reservation Indians and their property, they apparently would also claim that it would be unnecessary for Arizona to amend its disclaimer before assuming the "governmental" jurisdiction authorized by Public Law 280, 25 U.S.C §1322(a), §1324. But see, Washington v. Yakima Indian Nation, 439 U.S. 463 (1979).

v. Guardian Life Ins. Co., 384 F. 2d 126 (9th Cir. 1967) cert. denied 390 U.S. 950; Arizona v. Maypenny 608 F2d. 1197 (9th Cir. 1979).

Petitioners place preeminent reliance upon S.R. 755 in the legislative history of 43 U.S.C. §666 as a delineation of Congressional intent. S. Rep. No. 755 82d Cong., 1st Sess. (1951). They rely on the presence of a letter from the Department of Interior incorporated in S755 urging that certain exceptions be made clear in the McCarran Amendment. One of these exceptions was Federally reserved Indian water rights.

No specific exception was included in the language of the Bill enacted. Contrary to the general rule, that where Congress intends to affect Indian Tribes, Reservations and jurisdiction it does so expressly and that nothing is to be implied by Congressional silence, the Petitioners conclude that silence is evidence of specific intent of Congress to do the following: (1) waive the sovereign immunity of the Tribe; (2) grant States subject matter jurisdiction over Tribal resources; (3) grant in personam jurisdiction over the Tribe to the States; (4) amend by implication the various federal enabling acts and statutes modifying those acts; (5) amend the

Constitution of the State of Arizona and other States with disclaimer clauses; (6) overrule specific decisions of the Arizona State Appellate Courts on assertion of State Court jurisdiction over Indian Tribes; (7) overrule Federal Appellate Court decisions relating to Arizona jurisdiction over Indian Tribes; and (8) abrogate Indian Treaties requiring "exlusive" Federal jurisdiction.

The Tribes submit that such an extended and extreme intent may not be implied from silence. Congress would have been more justified in presuming that Federally reserved Tribal water rights would remain exempt from State jurisdiction on the basis of previous clear pronouncements of Congress and the Supreme Court and, therefore, no exceptions were necessary in a statute which was completely silent on its face as to Indians. See, History, supra, and Holtzman v. Schlesinger 484 F2d. 1307 (2d Cir. 1973) cert. denied. 416 U.S. 936. Certainly, this interpretation is as valid as the conclusions made by the Petitioners. The Akin Court was not presented with these questions.

In addition, the Senate and the House of Representatives have long established rules of procedure to govern the conduct of those bodies. These rules are designed to avoid

inadvertent amendment or repeal of previous law which Congress has no intent to alter.

The House rules require that

> "Whenever a Committee reports a bill or a joint resolution repealing or amending any statute or part thereof it shall include in its report or in an accompanying document — (1) the text of the statute or part thereof which is proposed to be repealed; and (2) a comparative print of that part of the bill or joint resolution making the amendment and of the statute or part thereof proposed to be amended, showing by stricken, hyphenated through type and italics, parallel columns, or other appropriate typographical devices the ommission and insertions proprosed to be made."
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> "This rule was adopted January 28, 1929 . . . although a bill proposed but one minor and obvious change in existing law, the failure of the report to indicate the change is in violation of the rule . . . . The statute proposed to be amended must be quoted in the report and it is not sufficient that it is incorported in the bill. Under the rule the Committee report on a bill amending existing law by the addition of a proviso should quote in full the section immediately preceding the proposed amendment. . . . The rule applies to appropriation bill where such bills include legislative provisions . . . in order to fall within the purview of the rule the bill must seek to appeal or amend specifically an existing law."[117]

Likewise the Rules for the United States Senate provide

> "Whenever a Committee reports a bill or a joint resolution repealing or amending any statute or part thereof it shall make a report thereon and

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[117] H.R. Rules, Rule XIII 3.

> shall include in such report or an accompanying document . . . (a) the text of the statute or part thereof which is proposed to be repealed; and (b) a comparative print of that part of the bill, or joint resolution making the amendment and of the statute or part thereof proposed to be amended, showing by stricken - through type and italics, parallel columns, or other appropriate typographical devices the ommissions and insertions which would be made by the bill or joint resolutions if enacted in the form recommended by the Committee. This subsection shall not apply to any such report in which it is stated that, in the opinion of the Committee, it is necessary to dispense with the requirements of this subsection to expedite the business of the Senate."[118]

In addition, the Senate procedure requires a specific procedure for the amendment of a Treaty concluded with an Indian Tribe.

> "All Treaties concluded with Indian Tribes shall be considered and acted upon by the Senate in its open or legislative session, unless the same shall be transmitted by the President to the Senate in confidence, in which case they shall be acted upon with closed doors."[119]

None of the reports relating to the adoption of the McCarran Amendment indicated in any manner whatsoever an intention on the part of Congress to amend or repeal any statute affecting Indian Tribes, Treaties, Federal enabling acts

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[118] Standing Rules of the Senate, Senate Rules and Manual for the Use of the 82nd Congress, Senate Resolution #4, January 8, 1951, Rule 29, Subparagraph 4.

[119] Rule XXXVII, Senate Procedures, C. L. Watkins and F.M. Riddick, 578 (1958).

or the 1934 Indian Reorganization Act. The argument of Petitioners based upon statutory construction requires both the House and the Senate to have violated their own Rules of Procedures which those bodies have adopted to assure an orderly and predictable process of legislation; one which occurs without surprise. This should not lightly be inferred by the silence of both Houses of Congress.

Finally, it is presumed that Congress does not intend to abrogate rights guaranteed by Indian Treaties where it passes general laws, unless it makes specific reference to Indians. Antoine v. Washington, 420 U.S. 194 (1975); Menominee Tribe v. United States, 391 U.S. 404 (1968); United States v. White, 508 F.2d 458 (8th Cir. 1974); United States v. Farris, 624 F.2d 890, 893 (1980).

III.

THE ARIZONA PROCEEDINGS DO NOT QUALIFY AS A GENERAL STREAM ADJUDICATION SUIT FOR PURPOSES OF THE MC CARRAN AMENDMENT

The Petitioners raise as a "Question Presented for Review":

> II."Did the Arizona District Court correctly determine that considerations of wise judicial administration require adjudication of all conflicting water rights in a comprehensive state general adjudication rather than through piecemeal federal

and state actions?"

The Question is not ripe for review by this Court. The Ninth Circuit expressly reserved decision on this issue and found it unnecessary to decide in light of its holding; the court noted in passing that:

> ". . . the record indicates significant differences between these cases and the Akin case." San Carlos Apache Tribe of Arizona, et al v. The State of Arizona, et al. Pet. App. A-10.

Should this Court reach this issue, however, the following is submitted solely for purposes of argument, without admitting that the State has the requisite jurisdiction which must be found before the "Question Presented" is relevant.

Respondent Apache Tribes adopt by reference the arguments made in the brief for the Navajo Nation as follows: "THE AKIN DECISION," "28 U.S.C. 1362 AND THE HISTORICAL TRADITION OF FEDERAL JURISDICTION," "FEDERAL ADJUDICATION OF THE NAVAJOS CLAIM WILL NOT WASTE JUDICIAL RESOURCES," "THE NAVAJOS SUIT INVOLVES ONLY FEDERAL ISSUES," "RESERVED INDIAN WATER RIGHTS MUST BE DETERMINED SEPARATELY, EVEN IN GENERAL STREAM ADJUDICATIONS," "THE NAVAJOS' FEDERAL ACTION AVOIDS POSSIBLE CONFLICTS OF

INTEREST."

In addition the Apache Tribal Respondents incorporate by reference the arguments made by Tribal Respondent Fort McDowell Mohave-Apache Community as follows: "THE FEDERAL COURTS' OBLIGATION TO EXERCISE JURISDICTION IS ESPECIALLY STRONG WHERE A TRIBE INVOKES JURISDICTION PURSUANT TO 28 U.S.C. 1362" and "UNLIKE THE FEDERAL ACTION CONSIDERED IN COLORADO RIVER, THE COMMUNITIES FEDERAL ACTION WILL NEITHER DUPLICATE NOR IMPAIR THE COMPREHENSIVE STATE PROCEEDINGS."

The Federal Enabling Act and the Apache Treaty constitute the "supreme law of the land concerning the jursisdiction over the Apache Tribe and its reservation property rights. The state statute as it is applied to the Apache Tribal Respondents violates the supremacy clause of the United States Constitution. "[A] treaty guaranteeing certain rights to the subjects of a signatory nation is self-executing and supersedes state law. Asakura v. City of Seattle, 265 U.S. 332, 341 (1924). Consequently the state may enact and enforce no statute or regulation in conflict with treaties in force between the United States and the Indian Nations." United States v. Washington,

520 F.2d. 676, 684 (1975)

A. The Mc Carran Amendment Is Inapplicable: Arizona Statutes Do Not Qualify As A "Suit" As Required In McCarran.

Any State proceeding which purports to include the United States pursuant to the McCarran Amendment must meet specific requirements. Indeed, the applicability of the McCarran Amendment consent to jurisdiction is predicated upon fulfillment of such requirements. State of California v. Rank, 293 F.2d 340, 347 (9th Cir. 1961), aff'd in part, reversed in part on other grounds sub. nom. Dugan v. Rank, 372 U.S. 609 (1963). One of the significant requirements in the instant case is the requirement that all rights of all claimants on a stream system must be ascertained and officially stated in an adjudication suit. Thus in Dugan v. Rank, supra, the claimed applicability of the McCarran Amendment was rejected because the requisite participation of all claimants and all rights in an inter sese adjudication was found to be lacking.

The State of Arizona has enacted and repeatedly revised a series of statutes relating to stream adjudication which Petitioners allege comply with the criteria imposed by McCarran. A review of these provisions discloses several deficiencies which disqualify the Arizona proceedings. They

fail to include all rights and all users. Moreover, the proceeding contemplated by the provisions is not in "a suit adjudication" within the meaning of the McCarran Amendment. The structure of the entire proceeding is also inherently prejudicial to determination of Tribal rights.

The subject stream adjudication statutes are now found at A.R.S. §45-250 to 258. Although the state has characterized major changes to the statutes occurring in the last three years as "refinements" (Pet. Brief 6), these changes are more properly characterized as attempts to cure defective provisions in the hope of complying with the McCarran mandates.[120]

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[120]The Statutes were originally found at A.R.S. §45-230, et seq., JA 99-107. Following the filing of the Tribe's original declaratory action in Federal District Court, the Arizona legislature enacted major changes to the statute. An attempt was made to transform an administrative proceeding under A.R.S. §45-232, JA 99, into a judicial proceeding by transfer of pending proceedings to the Arizona Superior Court (A.R.S. §45-258, JA 116) repealed by laws 1980, 4th S.S., Ch. 1, §71, effective June 12, 1980. The Arizona Legislature also amended that portion of the statute requiring payment of filing fees to prohibit imposition of any fee "upon any Indian Tribe, community or allottee personally appearing in the general adjudication to assert claims to water." Cf (A.R.S.§45-254(F) JA 112 with the amended version, JA 123). In 1981, the Arizona Legislature yet again amended the statutes to provide for consolidation of statutory water rights proceedings with other pending proceedings. (A.R.S.§45-252(C), JA 120).

The statutes purportedly provide for a "general adjudication"[121] upon petition by a "person"[122] to determine the "nature extent and relative priority of the water rights of all persons in the river system and source."[123] The statutes define "river system and source" to mean "all water appropriable under §45-131 and all water subject to claims based upon federal law."[124] Petitioner, Salt River Valley Water Users Association, filed a petition for determination of the rights in and to the Salt River above the Granite Reef Diversion Dam.

Following service of summons, interested parties are required to submit a "statement of claim" on an approved form[125] which calls for information such as the quantities of water, the period of time during the year for which use is claimed (A.R.S. §45-254(3), the time of the initiation of the right, and the date when water was first used for beneficial

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[121]Defined by the statute as "an action for the judicial determination or establishment of the extent and priority of the rights of all persons to use water in any river system and source." (A.R.S. §45-251(1) JA 119).

[122]Defined by the statute to mean "An individual, a partnership, a corporation, a municipal corporation, the State of Arizona or any political subdivision, the United States of America, an Indian Tribe or community or any other legal entity, public or private." (A.R.S. §45-252(2) JA 119).

[123]A.R.S. §45-252(A), JA 119.

[124]A.R.S. §45-252(4), JA 119.

[125]JA 20-25.

purposes and the times claimed (A.R.S. §45-254(A). The statutes further provide that any potential claimant who fails to file a Statement of Claimant in accordance with the requirements of the statute shall be "barred and estopped from subsequently asserting any right theretofore acquired upon the river system and source and shall forfeit all rights to the use of water in the river system and source theretofore claimed by him."[126] (emphasis added).

The statutes provide for the technical assistance of the Director of the Arizona Department of Water Resources in locating records, conducting a general investigation of the river system and source, and investigating and examining facts pertaining to the claim asserted by the claimant. After performing these and other duties, the Director is required to present a report to be filed with the master. Interested parties thereafter have 180 days in which to file written objections. Claimants filing written objections have an opportunity to present evidence in support of or in opposition to portions of the report objected to, as well as to present evidence in support of the claim and objections to any other claim.[127] The

[126] A.R.S. §45-254(E), JA 123.
[127] A.R.S. §45-256, JA 124.

statutes also provide for a master to conduct hearings and take testimony "as shall be necessary to determine the relative water rights of each claimant."[128]

The court, upon review of the master's report, is thereafter required to determine the extent and priority date of and adjudicate any interest in or right to use of the water of the river system and source, provided that when rights to use of water or dates of appropriation have previously been determined in a judgment or decree of a court, the court must accept the determination of such rights and dates of appropriation as found in the judgment or decree unless such rights have been abandoned. The determinations of the court are thereafter referred in the form of a final judgment or decree to the Director for "administration and enforcement"[129]

This Court has addressed only indirectly the question of nature and form of a proceeding qualifying for application of McCarran. In Akin, the comprehensive nature of the Colorado State Stream Adjudication was stipulated by the United States.[130] Although in U.S. v. District Court for Eagle

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[128] A.R.S. §45-257(A)(1), JA 126.

[129] A.R.S. §45-257(B)(3), JA 127. No provision is provided for hearing or taking evidence before the Judge.

[130] Akin, 424 U.S. at 819, n. 24. Contrasted with the Stream (Cont.)

County, 401 U.S. 520 (1971), the qualification of the Eagle River and its tributaries as a "river system" within the meaning of McCarran was addressed by the Court, this Court has never addressed the adequacy of a State Stream Adjudication Proceeding for application of McCarran to an action brought by an Indian Tribe.[131]

Waivers of sovereign immunity are strictly construed. United States v. Mitchell, 445 U.S. 535, 538 (1980). Since McCarran contains a waiver of sovereign immunity, any prerequisite condition for that waiver must be completely fulfilled.

The Arizona Statute is deficient in several respects. Any single defect as discussed herein disqualifies the Arizona Statutes for application of McCarran. Each defect results in

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Adjudication Statutes of Colorado, the Arizona Stream Adjudication Statutes are greatly limited. Colorado statutes divide the state into seven water divisions based on natural drainage basins. (Colo. Rev. Stat. §37-92-101). Each division has a separate water judge who is given exclusive jurisdiction over "water matters within the division." Id., §37-92-203(1). These water judges continuously adjudicate the rights claims using a coordinate system of water referees. (Colo. Rev. Stat. §37-92-203(4) to 203(7), -301(2), -302 to 303.) The Arizona statutory schemework has none of these features.

[131] In Akin, the Court reserved the question of adequacy of the state proceeding to resolve federal claims as well as the status of a private party litigant as affecting the court's considerations. 424 U.S. 800, n. 26.

an incomplete determination or alternatively in a proceeding which is not a "suit" within the meaning of the McCarran.

B. Lack Of Subject Matter And In Personam Jurisdiction Over The Tribe Precludes Adjudication Of All Rights.

Throughout this litigation, both in the trial court[132] and before the Ninth Circuit, the Tribe has repeatedly argued that it possesses rights to water reserved to itself and not necessarily encompassed in the water reserved by the federal government; therefore these rights are not assertable by the federal government in its trust capacity. The existence of these rights and the Tribe's claims to such rights are not cognizable by the Arizona Superior Court, under the subject Statutes.[133]

The San Carlos Apache Indian Tribe has never ceded to the United States its rights to water based upon its aboriginal title claim, United States v. Santa Fe Pacific Railroad Co., 314 U.S. 339 (1941).[134] Only particular rights are granted to the United States with the Tribe holding other rights such as

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[132] See, e.g. excerpt of oral argument, TA C1, before Federal District Court for District of Arizona, Hon. Valdemar A. Cordova Pres.

[133] A.R.S. §45-131 and 45-252(4).

[134] See also, Worcester v. Georgia, 6 Pet. 515 (1832); United States v. Winans, 198 U.S. 371 (1905); Skeen v. United States, 273 F.93 (9th Cir. 1921).

claims to water. United States v. Ahtanum Irrigation District, 236 F.2d 321, 326 (9th Cir. 1956). "The treaties were not a grant of rights to the Indians but a grant of rights from them- a reservation of those not granted." United States v. Winans, 198 U.S. 371, 381 (1905); United States v. Washington, supra, at 684.

The Tribe also has asserted and continues to assert claims to water predicated upon the Tribe's relationship with the independent nations of Spain and Mexico prior to the time the United States gained political control over the exterior boundaries of the present states of Arizona and New Mexico. (See Recopilacion de Leyes de los Reynos de las Indios, Antonio Balbas Ed. (1756);[135] Treaty of Guadaloupe Hidalgo, 9 Stat. 922 (1848); the Gadsen Treaty between the United States and Mexico, 10 Stat. 1031 (1853). See also, New Mexico v. Aammodt, 537 F.2d 1102 (10th Cir. 1976) cert. denied 429 U.S. 1121 (1977)).

The scope of the McCarran Amendment does not encompass rights held by the Tribes separate from the United

[135]Spanish law specifically protected Tribal lands and emphasized that Tribal water rights were to remain unimpaired by colonization efforts. See Id. TA D-6.

States. Nothing in this Court's opinion in Akin is inconsistent with this contention, since no Tribe was a party in Akin, nor was any claim made of Indian water rights not within the Federal trust. Moreover, the Arizona proceeding does not recognize such claims, since a "river system and source" as defined by the statute only recognizes state law claims and federal law claims. Claims based on international law are apparently excluded. Since rights inherent in the Tribe and assertable only by the Tribe are not involved, the Arizona proceeding does not provide for determination of "all rights to the use of water."

Moreover, the absence of in personam or subject matter jurisdiction over the Tribe creates an additional fatal deficiency in the State Stream Adjudication disqualifying it from the scope of McCarran

C. Arizona's Statutory Procedure is Inherently Biased Against The Tribe, Administrative In Nature And Not Within The Scope Of The McCarran Amendment.

McCarran expressly limits consent of the United States to joinder to any "suit" for the "adjudication of rights to the use of water of a river system or other source".[136] Additional

[136] 43 U.S.C. §666(A).

language in McCarran prohibits judgments for costs against the United States and specifies the method of service of process.[137] Thus, Congress clearly intended that McCarran consent to operate only in a "suit" which is defined as a proceeding by one person or persons against others in a court of justice in which the plaintiff pursues, in such court, the determination and enforcement of a right, whether in law or equity. (Kohl v. U.S., 91 U.S. 367, 375 (1875); Weston v. Charleston, 2 Pet. 464 (1829). As used within McCarran, the word "suit" does not include a proceeding before an administrative body such as a State Water Board. Dugan v. Rank, 372 U.S. 609 (1963). As an administrative proceeding, Arizona's scheme for determining water rights is inherently prejudicial to the Apache Tribes.[138]

Unlike previous stream adjudication proceedings examined by this Court,[139] the Arizona proceedings require deter-

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[137] Id.

[138] The institutional bias inherent in the office of the Director of the Arizona Department of Water Resources was carefully detailed by the United States in a Motion to Dismiss the Arizona Stream Adjudications, a copy of which is included in the Apache Tribe's Appendix. See, TA F27-38.

[139] In Akin, the Colorado Water Right Determination and Administration Act (Colo. Rev. Stat. Ann. §37-92-101, et seq. (1974)) under review provided for determination of water rights by a water judge designated for each of the drainage basins for (Cont.)

mination of key litigation facts by the Department.

Under the statutes, the Director is required to conduct a general investigation of the river system and source;[140] and to investigate or examine the facts pertaining to the claims asserted by the claimants; [141] to make a map or plat showing points of diversion;[142] and to take such other steps "as may be necessary or desirable for a proper determination of the relative rights of the parties."[143] The Director must also prepare a report which sets forth in a summary form on a claim-by-claim basis the findings and determinations with the court or the master. Interested parties are given an opportunity to file written objections to the report and to present evidence in support of or opposition to those parts of the report to which the written objections were directed.

A master must also prepare a report,[144] after which the court must then enter a final judgment or decree to the Director for enforcement and administration.[145]

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the larger rivers in Colorado.
[140] A.R.S. §45-257(3).
[141] A.R.S. §45-257(4).
[142] A.R.S. §45-257(5).
[143] A.R.S. §45-256(6), JA 125.
[144] A.R.S. §45-257(A)(2), JA 126.
[145] A.R.S. §45-257(3), JA 126.

While some of the elements of a "suit" may be discerned in the Arizona proceeding, the determinations of fact are wholly made in an administrative context by the Director of the Arizona Department of Water Resources. Thus, while these actions take place, the Arizona adjudication process is essentially preliminary and administrative and not a "suit" within the meaning of McCarran. See Pacific Livestock Co. v. Oregon Water Board, 241 U.S. 440, 446 (1916)[146]. The special consent of the United States to joinder in a "suit" as found in McCarran is therefore unavailable when applied to the Arizona proceedings.

D. The Arizona Proceedings Attempt to Adjudicate Rights In An Interstate And International River System.

Although the Arizona proceedings purport to provide a complete adjudication of all rights, the current posture of the proceedings preclude any such adjudication.

The original state action brought pursuant to A.R.S. §45-230 designated the Salt River above the Granite Reef Diversion Dam as the "river system or source" for determina-

[146]The United States has similarly viewed the Arizona proceedings as defective in this regard and urged dismissal of the Arizona state action on this basis. See, U.S. Motion, TA F19-27.

tion. JA 162-168. Other proceedings were commenced on the Verde River and on the Gila River. Following amendment to the Stream Adjudication Statutes in 1981 authorizing consolidation of general adjudication proceedings,[147] these three proceedings were consolidated into a single proceeding by order of the Arizona Supreme Court on November 24, 1981.[148]

The consolidation of the proceedings has created a situation wherein all of the rights and claimants to rights in the river system and source designated by the State of Arizona cannot possibly be adjudicated. The Gila River and several of its tributaries are interstate streams.

Arizona has no jurisdiction over the State of New Mexico, for its claims, nor other claims originating in New Mexico. This Court has original jurisdiction in matters involving water rights of interstate streams. Moreover, the Eleventh Amendment to the United States Constitution precludes jurisdiction over the State of New Mexico in the Arizona State Court proceeding.[149]

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[147] S.B. 1393, 35th Legislature, first regular session, 1981, Ch. 176 now found at A.R.S. §45-252(C).

[148] A certified copy of the order is reproduced in the Tribe's Appendix, TA H-1.

[149] S. Rep. No. 755 82nd Cong., 1st Sess., page 6 (1951).

In addition, two other tributaries of the Gila River originate in or flow for a significant distance within Mexico. Arizona has no jurisdiction to adjudicate the water rights of Mexico or claimants in Mexico. These water rights are not held in trust by the United States, but are subject to international treaty with Mexico and cannot be affected by State courts.

McCarran does not provide any consent to suits for adjudication of interstate or international streams. Part (c) of the Amendment expressly states that nothing in the Amendment shall be construed as providing United States joinder in interstate stream adjudication proceedings.[150] The language was included in order not to open up any controversies between the states as to water rights on an interstate stream by permitting the United States to be made a party thereto.

The river system or source designated by the state in the present stream adjudication proceeding is both an interstate and an international stream. The rights to this river system or source cannot be adjudicated in the context of a state court proceeding. Since the adjudication of all rights is

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[150] 43 U.S.C. 666(c)(1974).

not possible in this state proceeding, the McCarran Amendment consent to suit is not applicable.

IV.

THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT PROHIBITS CONGRESSIONAL CONSENT TO STATE ADJUDICATION OF RIGHTS RESERVED ON BEHALF OF FEDERAL INDIAN TRIBES.

Although the power of Congress over Indians, Indian Tribes and Reservations is often described as "plenary", this power is subject to the limitations found in the United States Constitution. While the federal government has the power of control and management of property and affairs of its Indian wards, this power is curtailed by Constitutional guarantees accorded Indians. The federal government is not allowed to deal with Tribal land "as if it were its own."[151] Thus, this Court has held that the federal government, in taking Indian property for non-Indian use, is limited by the Fifth Amendment in requiring compensation[152] and that uncompensated takings may be enjoined.[153]

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[151] Chippewa Indians v. United States, 301 U.S. 358, 375-376 (1937).

[152] Shoshone Tribe v. United States, 299 U.S. 476 (1937); Choate v. Trapp, 224 U.S. 665 (1912).

[153] Lane v. Pueblo of Santa Rosa, 249 U.S. 110 (1919); Pyramid Lake Paiute Tribe v. Morton, 354 F.Supp. 252 (D.D.C. 1973).

The Fifth Amendment limitations on Congressional action in matters affecting Tribal property have profound ramifications upon the validity of a waiver of sovereign immunity to suit by the United States under McCarran where it is argued to extend to adjudication of Tribal property in State Adjudications.[154] These limitations are constraints upon the broad general powers of Congress.

Fifth Amendment guarantees accorded to Indians are unique due to the previously demonstrated historical relationship of the federal government and Indian Tribes. Thus, in Morton v. Mancari, 417 U.S. 535 (1974), this Court rejected a due process attack on an Indian hiring preference under the Indian Reorganization Act by noting that the issue turned "on the unique legal status of Indian Tribes under federal law" and upon the plenary power of Congress based upon a history of treaties and the "guardian ward" status of Indian Tribes[155]. This Court further described the origin of the relationship as

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[154]The Tribes raised the issue of constitutional violations arising from attempted adjudication of Tribal rights in state court in both the trial court and the Court of Appeals. Tribe's Motion to Strike, Motion to Dismiss filed on October 30, 1979, page 27; e.g. Opening Brief of San Carlos at 9th Circuit Court of Appeals at 41.

[155]Morton v. Mancari, 417 U.S. 535, 551 (1974).

arising out of the takeover by the federal government, sometimes by force, of Indian lands and the requirement of protection of the Tribes against others.[156]

Concomitant with the Constitutional duties of the federal government in disposing of Tribal property, a corresponding group of rights accorded Fifth Amendment protection have been created in Indians and Indian Tribes. These rights include a Fifth Amendment right to an exclusive federal-Tribal relationship in the disposition of Tribal property rights, including water rights.[157]

By treaties and in statutes spanning more than 100 years, the federal government has created in the Respondent Tribes a property right which manifests itself in exclusive Federal jurisdiction in all matters affecting the vital rights of the Tribes. This valuable right is destroyed where those rights are exposed to jurisdiction and regulation by the respective states whose interests are often inimical to those of the Tribe. U.S. v. Kagama, 118 U.S. 375 (1886)[158].

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[156] Id.

[157] In the Apache Treaty of 1852, the Apache Tribes bargained for an exclusive relationship with the United States and submitted to the protection of the United States based upon that promise. Apache Treaty, Article I.

[158] In Kagama, the court noted: "These Indian Tribes are wards (Cont.)

Throughout the history of this country, the federal government, and not the states, has been the exclusive forum in which Tribal rights have been controlled and determined.

Federal courts have recognized for many years that an agreement between an Indian Tribe and the federal government create vested rights which are afforded protection under the Fifth Amendment. Board of Commissioners of Tulsa County, Oklahoma v. United States, 94 F.2d 450 (10th Cir. 1938). Moreover, these "rights" which are protected by the Fifth Amendment include rights such as freedom from state regulatory schemes. Thus, in Tulsa County, the Court of Appeals for the 10th Circuit acknowledged the vested right of Cherokee allottees under Section 13 of the Cherokee Agreement, 32 Stat. 716 (Act of July 1, 1902) to be exempt from taxation.

The Tribes have entered numerous agreements with the United States in which, as part of the bargained-for consideration, the Tribes ceded elements of control to the federal government in exchange, in part, for the solemn promise of the United States that the Tribe would remain "exclusively under

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of the nation . . . they owe no allegiance to the states and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemy." Id at 384.

the law, jurisdiction and government of the United States of America."[159]

Under the Indian Reorganization Act of 1934 the Tribes once again entered negotiations with the United States and agreed inter alia, that the Secretary of the Interior would take their land in trust and that they would be consulted on all matters affecting tribal property and would further have the power to veto any disposition which was unacceptable to the Tribe.[160] McCarran is therefore unconstitutional to the degree it purports to interfere with the Tribe's vested right to an exclusive federal-Tribe relationship.

This right to an exclusive federal-Tribal relationship in

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[159] 10 Stat. 979, 981 (1852). The 9th Circuit opinion in Adsit concurred with the original contractual nature of the exclusive federal-Tribe relationship, noting:

> "Through conquest and treaties [Indian Tribes] were induced to give up complete independence and the right to go to war in exchange for federal protection, aid, grants of land . . . [citations omitted]. Were the state to expressly disclaim jurisdiction and the federal courts to give up their protective jurisdiction over Indian lands, including water rights, the Indians would seem deprived of this original bargain they were driven to make." Adsit, Pet. App. C-9, 10.

[160] The San Carlos Apache Tribe enacted a charter under the Indian Reorganization Act and later amended the charter. The Tonto Apache Tribe organized under the Indian Reorganization Act and adopted a constitution approved by the Commissioner of Indian Affairs on January 21, 1980.

matters affecting the disposition of Tribal property has been fostered and encouraged by the United States, set forth in solemn treaty obligations and reflected in numerous federal laws and regulations[161].

The Tribes acknowledge the prior holding of this Court in Akin, 424 U.S. 800 (1976). That case, however, did not address the issue of Constitutional limitations placed upon Congress in submitting Tribal property rights to adjudication in state forums. The Constitutional limitations upon Congressional disposition of Tribal property rights in state forums has never been addressed.

Since the Apache Treaty limits the jurisdiction and law to which the Apaches have consented to be subject, and valuable consideration was exchanged for that consent, the Fifth Amendment prohibits Congressional delegation of federal adjudicatory control over Tribal property, without due process

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[161] See, e.g., 25 U.S.C. §476, 477 (Congressional Grant of Authority to Tribes Under Indian Reorganization Act to Veto Disposition of Tribal Property); 25 U.S.C. §81 (Requirement of Secretarial Approval on Contracts with Indian Tribes or Indians Requiring Approval of Secretary of the Interior and Commissioner of Indian Affairs); 25 U.S.C. §86 (Contracts Relating to Tribal Funds or Property in the Hands of the United States Requires Prior Consent of United States); 28 U.S.C. §1362 (Federal District Court Jurisdiction Over Claims Brought by Indian Tribes).

of law and just compensation. McCarran's waiver of sovereign immunity is inapplicable to the property of the Tribes.

V.

THE FEDERAL GUARDIANSHIP OBLIGATIONS TO TRIBES PRECLUDES SUBJECTION OF TRIBAL RIGHTS AND RESERVATIONS TO STATE WATER ADJUDICATION PROCEEDINGS.

The Arizona statutes contain express provisions for "enforcement and administration"[162]. As previously noted, this administration is done not by the court, or a court official, but is performed by the Director of the Department of Water Resources. Petitioners contend that the state has authority to regulate water on the Reservation for purposes of administration and enforcement.[163].

To interpret McCarran to permit state administration of Tribal water rights and enforcement schemes squarely conflicts with the fundamental cannon governing construction of statutes requiring express waiver of the sovereign immunity of the Tribe and conflicts with federal law authorizing the Secretary of the Interior to regulate waters on the Reservation.[164]

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[162] A.R.S. §45-257(B)(3).

[163] Id.

[164] 25 U.S.C. 381 provides: "In cases where the use of water for irrigation is necessary to render the lands within any Indian Reservation available for agricultural purposes, the Secretary (Cont.)

"Administration and enforcement" of a state adjudication means that the Tribes are no longer safe in their Reservations from state control. They will be subject to incursions on the Reservation for inspections, demands for compliance, criminal sanctions and other forms of administrative harassment, all without the express consent from Congress.

The power to regulate is the power to destroy. See, McCulloch v. Maryland, 4 Wheat. 316 (1810). The concept of a state vesting any tribunal with the power to adjudge, enforce or extinguish rights and duties is built upon the fundamental concept of power. Pennoyer v. Neff, 95 U.S. 714 (1877). See, Osborn v. Bank of the United States, 9 Wheat. 738 (1824); Bank of the United States v. Planters Bank, 9 Wheat 904 (1824); Pacific Railroad Removal Cases, 115 U.S. 1 (1885); Textile Workers Union v. Lincoln Mills, 335 U.S. 448 (1957).

Nothing in the Court's previous opinion in Akin is inconsistent with this position. In Akin, the sole concern was the subjection of Tribal rights to state adjudication. The court

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of the Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor."

did not address the issue of purported state regulatory control over Tribal water resources following an adjudication. Nor does the consent in McCarran to join the United States in a suit ". . . for the administration of such rights" apply to administration of water rights on Indian Reservations.

This Court has repeatedly held that states may not intrude upon Indian Reservations with regulatory schemes. McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973); Bryan v. Itasca County, 426 U.S. 373 (1979). This Court has also cited with approval lower court opinions which have similarly rejected state intrusions into Indian Reservations.[165]

Application of these provisions to the Tribes and their resources means that the Reservations of the Respondents will be subject to the full panoply of state administrative control. Pursuant to A.R.S. §45-103, the Director has "general control and supervision of surface water, its appropriation and distribution, and of ground water . . . ." The statutes mandate the

[165] Santa Rosa Band of Indians, et al., v. Kings County, 532 F.2d 655 (9th Cir. 1975) cited in Bryan v. Itasca County. In Santa Rosa Band of Indians, the 9th Circuit noted that [T]ribal use and development of Tribal trust property presently is one of the main vehicles for the economic self-development necessary to equal Indian participation in American life. Extension of local jurisdiction to the Reservation would burden that development by increasing its costs." Id. at 664.

creation of water districts and the creation of a "water superintendent."[166] This water superintendent is charged with the authority to regulate and control the use of waters in his district. This authority is supported by A.R.S. §45-112, which creates criminal liability for a variety of conduct including diverting waters from a stream without authority.

This regulatory scheme exposes the Tribes to administrative harassment, interferes with the police power authority of the Tribes as inherent sovereigns to regulate and control water within their Reservations and infringes upon the Constitutionally protected federal-Tribe relationship in disposition of Tribal property.

Since the lack of administrative and regulatory authority on the part of the state over Indian Reservations would render any decree entered unenforceable as to Indian Tribes, the decision of the Ninth Circuit is correct.

CONCLUSION

Petitioners have asked that this Court affirm the ruling of the Federal District Court. Since the original action was directly against the Tribes and their property as well as the

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[166] A.R.S. §45-109.

Trustee, United States, the result of affirming the lower court's decision would be to place the Tribes, their property and the Trustee in the State proceedings.

This result not only flies in the face of the sovereign immunity of the Tribes, but also violates the sacred relationship between the Tribe and the United States which was developed nearly a century and a half ago.

The Apache Tribes view this Court as the institutional memory and the final protector of integrity of the Nation. This Court has not been reluctant to look back to the beginning in its analysis of major national concerns. A careful reading of the history of the evolution of Federal Indian law reveals that no state, whether it has a Federal disclaimer or not, has jurisdiction over Indian Tribes and Tribal property on their reservations. This Court would be historically and academically justified in re-evaluating its position in Akin.

Petitioners have quoted from the language of the United States' Memorandum on Petitions for Writs of Certiorari that "[i]t is too late in the day" "to read the Enabling Act Disclaimer as reflecting a Congressional Policy to oust state jurisdiction over Indian Reservation property interests, including water rights" and that the "momentum of the Court's

past decisions carries the day against the disclaimer ruling below." (U. S. Memo. at 15, 16)

Based upon the word of the Nation, a sacred agreement was struck with the Tribes. The argument of the United States and Petitioners eviscerates that relationship.

The greater the momentum toward the violation of a Nation's integrity, the greater the test of its institutions. The integrity of the rule of law of any Nation is only as strong as it is sufficient to resist such momentum. It is not too late in the day. Indeed it is never too late in the day to preserve the word of the Nation.

The request of the Petitioners should be denied, and the decision of the Ninth Circuit affirmed.

Respectfully submitted,

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INDIANS-CRIMINAL OFFENSES AND CIVIL CAUSES-STATE JURISDICTION

For text of Act see p. 663

Senate Report No. 699, July 29, 1953
[To accompany H.R. 1063]
House Report No. 848, July 16, 1953
[To accompany H. R. 1063]
The Senate Report repeats in substance the House Report.

Senate Report No. 699

The Committee on Interior and Insular Affairs, to whom was referred the bill (H.R. 1063) to confer jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States, and for other purposes, having considered the same, report thereon with the recommendation that it do pass without amendment.

This bill has been considered by the Committee on Interior and Insular Affairs of the House; on July 16, 1953, that committee submitted its report (H. Rept. 848) to the House, recommending its passage, and on July 27, 1953, it passed the House.

The Secretary of the Interior recommends the enactment of this proposed legislation as will appear from the Secretary of the Interior's report on H. R. 1063, dated July 7, 1953, which report is incorporated in said House Report No. 848.

The history and the reasons for the enactment of this proposed legislation is fully set forth in said House Report No. 848, a copy of which is attached hereto and made a part of this report, as follows:

[83d Cong., 1st Sess., Rept. No. 848]

The Committee on Interior and Insular Affairs, to whom

was referred the bill (H.R. 1063) to amend title 18, United States Code, entitled, "Crimes and Criminal Procedure," with respect to State jurisdiction over offenses committed by or against Indians in the Indian country, and to confer on the State of California civil jurisdiction over Indians in the State, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

Explanation of H. R. 1063

BACKGROUND HISTORY OF THIS LEGISLATION

Your Committee on Interior and Insular Affairs, through its Indian Affairs Subcommittee, and with the continuing cooperation of the Secretary of the Interior and the Indian Bureau, has, during this session, operated in five major areas of legislation affecting the Indians. This legislation, whether before the House or presently under committee consideration, has two coordinate aims: First, withdrawal of Federal responsibility for Indian affairs wherever practicable; and second, termination of the subjection of Indians to Federal laws applicable to Indians as such.

LEGISLATIVE HISTORY

To accomplish these aims, the Congress must consider:

1. Enactment of legislation terminating Federal responsibility for administering the affairs of Indian tribes within individual States as rapidly as local circumstances will permit

Legislation is presently contemplated with respect to tribes in the States of California, Florida, Iowa, New York, and Texas. Such action, of course, necessitates agreement with the proper public bodies of the political subdivisions affected, whereby individual States assume responsibility for the services customarily enjoyed by the non-Indian residents. In addition, provision must be made for distribution of tribal assets, either to tribal control, or to individual members, whichever may appear to be the better plan in each case; provisions must also be made relative to trust property responsibility in all instances.

2. Enactment of legislation terminating Federal responsibility for administering the affairs of individual Indian tribes as rapidly as circumstances will permit

In addition to legislation presently being considered for individual tribes, and members thereof, the committee is directing particular attention to legislation which would free from Federal supervision and control and from all disabilities and limitations specially applicable to Indians the following: The Flathead Tribe of Montana, the Klamath Tribe of Oregon, the Menominee Tribe of Wisconsin, the Osage Tribe of Oklahoma, the Potawatomie Tribe of Kansas and Nebraska, and those members of the Chippewa Tribe located on the Turtle Mountain Reservation of North Dakota.

3. Enactment of legislation terminating certain services provided by the Indian Bureau for Indians by transferring responsibility for such services to other governmental or private agencies, or to the Indians themselves.

In this area of operation, your committee has programed legislation which is aimed at withdrawal of Indian Bureau responsibility for health, welfare, soil conservation, and related programs. As an initial step, the committee has reported H. R. 303, which deals with the Indian Health Service, and the operation by the Bureau of Indian hospital and health facilities. H. R. 303, as reported, would transfer to the Department of Health, Education, and Welfare responsibility for this service; it would, at the same time, authorize transfer by the Secretary of that Department of such responsibility to State, county, or municipal subdivision, or to private nonprofit corporations, whenever satisfactory arrangements for such transfer could be agreed upon. In all instances of such service termination, care has been, and will continually be, taken to insure continuance of a high standard of service by the transferee agency.

It should be made clear that the transfer from one governmental agency to another will not create duplication of services; rather, it operates to place the Indian in the same position as non-Indians with respect to the service provided.

Members are familiar, in this area of legislation, with the numerous statutory enactments having as their purpose conferring of additional self-management upon specified tribes and individuals; this, through creation of tribal loan funds operated by the tribe, and increased authorizations for existing loan funds. Your committee has acted favorably on H. R. 5328, establishing a rehabilitation program for the Ute Mountain Tribe of the Ute Indians in Colorado, and similar legislation.

4. Enactment of legislation providing for withdrawal of individual Indians from Federal responsibility, at the same time removing such individuals from restrictions and disabilities applicable to Indians only

Congress has many times in the past considered and enacted legislation having as its purpose payments of current tribal income on a pro rata basis to individual members of each tribe where such payments are consistent with the point of safety in the protection of the tribe as a whole. Such payments recognize the responsibility of the tribe and of individual members to contribute a fair share of the cost of services enjoyed by them. Complementary to this aim have been the numerous bills providing for issuance of patents in fee to individuals, thus recognizing the ability of the individual to manage his own affairs.

Your committee has reported to the Speaker H. R. 4985, which would provide a procedure for the issuance of a certificate or decree of competency to any competent adult Indian making application, conceiving it to be a progressive piece of legislation in the general area considered here. Termination of Federal trusteeship over the property of competent Indians, and a complete discontinuance of all special services for them, can be fully accomplished only if a method is provided whereby the Indian who wishes to do so can obtain a declaration of competency, eventually to withdraw completely from the tribe, obtain his share of tribal property, and go on his way — as a truly "first-class citizen." If enacted, H. R. 4985 would, in its operation, go a long way in narrowing down and helping to clarify the complex problem posed by individual withdrawal.

5. Enactment of legislation having as its purpose repeal of existing statutory provisions which set Indians apart from other citizens, thereby abolishing certain restrictions deemed discriminatory

Interrelated legislation in this area deals with —

(a) restrictions applicable to Indians in personal-property transactions;

(b) restrictions applicable to Indians as to disposition of livestock;

(c) restrictions applicable to Indians having to do with possession and sale of firearms;

(d) restrictions applicable to Indians having to do with sale, possession, and use of intoxicants;

(e) the question of State civil jurisdiction over Indians;

(f) the question of State criminal jurisdiction over Indians.

The House, in enacting H. R. 3409, has indicated its desire to repeal Federal statutes applicable only to Indians having to do with personal property, the sale of firearms, and the disposition of livestock. The committee has reported to the Speaker H. R. 1055, which has as its purpose repeal of Federal statutes prohibiting use or possession by, or sale and disposition of, intoxicants to Indians. H. R. 3409, together with H. R. 1055 — if enacted — would abolish restrictions applicable only to Indians.

THE PRESENT BILL, H. R. 1063

As introduced, H. R. 1063 would have extended the criminal laws of the State of California to all the Indian country within that State. Concurrently, it provided for withdrawal of the entire State from operation of the Federal Indian liquor laws; finally, provision was made for permitting the California State courts to adjudicate civil controversies of

any nature affecting Indians within the State, except where trust or restricted property was involved.

Need for such legislation on a general, rather than limited basis is grounded on the following: These States lack jurisdiction to prosecute Indians for most offenses committed on Indian reservations or other Indian country, with limited exceptions. The applicability of Federal criminal laws in States having Indian reservations is also limited. The United States district courts have a measure of jurisdiction over offenses committed on Indian reservations or other Indian country by or against Indians, but in cases of offenses committed by Indians against Indians that jurisdiction is limited to the so-called 10 major crimes: murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny.

As a practical matter, the enforcement of law and order among the Indians in the Indian country has been left largely to the Indian groups themselves. In many States, tribes are not adequately organized to perform that function; consequently, there has been created a hiatus in law-enforcement authority that could best be remedied by conferring criminal jurisdiction on States indicating an ability and willingness to accept such responsibility.

Similarly, the Indians of several States have reached a stage of acculturation and development that makes desirable extension of State civil jurisdiction to the Indian country within their borders. Permitting the State courts to adjudicate civil controversies arising on Indian reservations, and to extend to those reservations the substantive civil laws of the respective States insofar as those laws are of general application to private persons or private property, is deemed desirable.

After consideration of the proposed legislation, the committee concluded that: any legislation in this area should be on a general basis, making provision for all affected States to come within its terms; that the attitude of the various States and the Indian groups within those States on the jurisdiction transfer question should be heavily weighed before

effecting transfer; and that any recommended legislation should retain application of Indian tribal customs and ordinances to civil transactions among the Indians, insofar as these customs or ordinances are not inconsistent with applicable State laws.

OPERATION OF H. R.1063 AND STATES AFFECTED

Your committee has amended the printed bill by adopting substitute language which operates to —

(1) confer as of date of enactment, civil and criminal jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, excepting specified areas within three of these States as hereinafter noted.

In the foregoing States the Indian Bureau advised State and local authorities who indicated their wilingness to accept the proposed transfer of jurisdiction. Indian groups in those States were, for the most part, agreeable to the transfer of jurisdiction, with certain groups opposing such transfer. The following tribes, each of which has a tribal law and order organization functioning in a reasonably satisfactory manner, have advised Bureau officials of their objections to State jurisdiction, and their reservation areas have therefore been excepted in the transfer legislation: Red Lake Band of Chippewa Indians of Minnesota, Warm Springs Tribe of Oregon, and the Menominee Tribe of Wisconsin.

(2) give consent of the United States to those States presently having organic laws expressly disclaiming jurisdiction to acquire jurisdiction subsequent to enactment by amending or repealing such disclaimer laws.

Examination of the Federal statutes and State constitutions has revealed that enabling acts for eight States, and in consequence the constitutions of those States, contain express disclaimers of jurisdiction. Included are Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Washington. Effect of the disclaimer of jurisdiction over Indian land within the borders of these States — in the absence of consent being given for future action to

assume jurisdiction — is to retain exclusive Federal jurisdiction until Indian title in such lands is extinguished; such States could, under the bill as reported, proceed to amendment of their respective organic laws by proper amending procedure.

(3) give consent to all other States to acquire jurisdiction over criminal offenses or civil causes of action at such time and in such manner as by affirmative legislative action such States may elect to acquire jurisdiction.

This provision would operate with respect to Nevada, and other States similarly situated. In Nevada, authorities of some counties have indicated their willingness to accept jurisdiction, others opposed it, and still others stated they would accept such jurisdiction only with an accompanying Federal authority. The reported bill leaves open for such States the door to acquiring jurisdiction in the future.

(4) as reported, this legislation would repeal existing Federal statutes having to do with intoxicants, and is applicable only to Indians within the named States.

The favorable report of the Department of the Interior on this legislation is as follows:

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY,
Washington 25, D.C., July 7, 1953.

My Dear Mr. Miller: At hearings before the Subcommittee on Indian Affairs of your committee on Monday, June 29, a request was made that this Department furnish your committee with a report reflecting the attitude of the various States and the Indian groups within those States on the question of the transfer of civil and criminal jurisdiction over Indians on their reservations to the respective States. The subcommittee also took action to amend H. R. 1063, a bill to confer civil and criminal jurisdiction on the State of California over Indians on the reservations in that State, to make it of general application rather than limit it to California and the subcommittee requested that representatives of this Department cooperate with the subcommittee in determining

the States in which the amended bill should be made applicable. This is in response to those requests.

The Bureau of Indian Affairs of this Department has consulted with State and local authorities and with the Indian groups on the question of transfer of civil and criminal jurisdiction on the States in the following States: California, Minnesota, Nebraska, Nevada, Oregon, Washington, and Wisconsin. Bills for each of the States except Nebraska and Washington are presently pending before the Congress.

In each of the States mentioned, with the exception of Nevada, State and local authorities indicated their agreeableness to the proposed transfer of jurisdiction. In the State of Nevada authorities of some of the counties indicated their willingness to accept jurisdiction, others opposed it, and others stated they would accept such jurisdiction only with an accompanying Federal subsidy. The Indian groups in those States were, for the most part, agreeable to the transfer of jurisdiction but certain groups opposed such transfer. The following Indian tribes, each of which has a tribal law-and-order organization that functions in a reasonably satisfactory manner, objected to being subjected to State jurisdiction:

Minnesota	Red Lake Bank of Chippewa Indians
Oregon	Warm Springs Tribe
Washington	Colville and Yakima Tribes
Wisconsin	Menominee Tribe

These Indian groups have expressed various reasons for their opposition to being subjected to State jurisdiction. The Red Lake Bank of Chippewa Indians, in voting unanimously in opposition to the extension of State jurisdiction, observed that State law would not be of any benefit to tribal members and that the tribal members should be given an opportunity by referendum election to accept or reject the extension of State jurisdiction. The Warm Springs Tribe expressed its fear that its members would not be treated fairly in the State courts. The Warm Springs Tribe constitutes an isolated population group. The reservation is located in two counties and the seat of each county government is some distance from the reservation. It has been reported that these two counties are poorly financed and heretofore have been unable to render any

appreciable assistance to the Indians on the reservation. The Colville and Yakima Tribes, in opposing State jurisdiction, expressed fear of inequitable treatment in the State courts and fear that the extension of State law to their reservations would result in the loss of various rights. The Menominee Tribe stated that its tribal police organization was capable of maintaining order on the reservation and that its people are not yet ready to be subjected to State laws.

The Bureau of Indian Affairs has consulted with State and local authorities and Indian groups only in the States mentioned above. However, we have other information which indicates that State authorities in Montana and South Dakota would be agreeable to a transfer of jurisdiction if such transfer were accomplished by a complete Federal subsidy. The Indians in these two States have indicated their unanimous opposition to the extension of State laws on their reservations.

It appears that there are legal impediments to the transfer of jurisdiction over Indians on their reservations in the case of a number of States. An examination of the Federal statutes and State constitutions indicates that enabling acts for the following States, and in consequence the constitutions of these States, contain express disclaimers of jurisdiction. These States are Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Washington. In these cases the enabling acts required the people of the proposed States expressly to disclaim jurisdiction over Indian land and that, until the Indian title was extinguished, the lands were to remain under the absolute jurisdiction and control of the Congress of the United States. In each instance the State constitution contains an appropriate disclaimer. It would appear in each case, therefore, that the Congress would be required to give its consent and the people of each State would be required to amend the State constitution before the State legally could assume jurisdiction.

This Department does not have information on the attitude and disposition of the State and local authorities and the Indian groups in the States, other than those listed in the second paragraph of this report.

Sincerely yours,

Orme Lewis,
Assistant Secretary of the Interior.

Hon A. L. Miller,
Chairman, Committee on Interior and Insular Affairs,
House of Representatives, Washington 25, D.C.

The Committee on Interior and Insular Affairs unanimously recommends the enactment of H. R. 1063 as amended.

CONSTITUTION
of the
TONTO APACHE TRIBE

We, The people of the Tonto Apache Tribe, adopt this constitution in order to reorganize and establish ourselves under Section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984, as amended) to secure the privileges and powers granted by Federal Law, and to exercise our sovereign and inherent powers to provide for an orderly and effective government of our affairs.

ARTICLE I - NAME

The name of the Tribe shall be the "TONTO APACHE TRIBE," hereinafter referred to as the "Tribe."

ARTICLE II - TRIBAL TERRITORY

The authority of the Tribe shall extend to all of the territory within our Indian Reservation, as established by the Act of Congress, October 6, 1972, P. L. 92-470, 86 STAT. 783, and held in trust for the Tribe by the United States Government, and to all lands which may hereafter be acquired by or set aside for the use of the Tribe. Tribal land, except land purchased for investment and not held in trust, shall be held by the Tribe and shall not be sold, assigned, conveyed or mortgaged, or otherwise encumbered except with the approval of the Tribal Council and as provided by Federal and Tribal law. Tribal land shall not be allotted to individual members of the Tribe, but may be leased to members of the Tribe and other persons in accordance with Tribal and Federal Law.

ARTICLE III - MEMBERSHIP

Section 1. Membership of the Tribe shall include all persons who have enrolled on the official census of the Tribe. Those persons entitled to enroll on such official census are those (a) who were living within ten (10) miles of the city limits of Payson, Arizona, on October 6, 1972, or lineal descendants of such persons who were alive on October 6, 1972, and (b) who possess at least one-fourth (1/4) degree Apache, Tonto Apache,

Western Apache, Yavapai-Tonto Apache or Yavapai-Apache Indian blood, or combination thereof.

Sec. 2.

(a) A lineal descendant of a member which lineal descendant possesses at least one-fourth (1/4) degree of Indian blood, shall be entitled to membership in the Tribe.

(b) Any lineal descendant of a member having less than one-fourth (1/4) degree, but no less than one-eighth (1/8) degree, of Indian blood or any child of no less than one-eighth (1/8) degree Indian blood under the age of twelve (12) years, who has been legally adopted by a member of the Tribe, may be adopted into the Tribe pursuant to an election as set forth in Section 4 of this Article.

(c) Persons of at least one-fourth (1/4) degree Indian blood not otherwise meeting the requisites of Article III, Sections 1 and 2, may be adopted into the Tribe pursuant to an election as set forth in Section 4 of this Article.

Sec. 3. No person shall be a member of the Tribe who is enrolled with any other Federally recognized Indian tribe, band or group unless such person shall first relinquish membership therein.

Sec. 4. An election required under this Article may be called by a majority of the Tribal Council and shall be called by the Tribal Council upon the presentation of a petition requesting such an election signed by at least one-fourth (1/4) of the eligible voters of the Tribe. A person shall be adopted into the Tribe by a majority vote of the eligible voters of the Tribe voting in an election noticed for that purpose, in which at least thirty percent (30%) of those entitled to vote shall vote. Notice for the purposes of this Section shall be posted no less than ten (10) days and shall be made pursuant to the rules, regulations or ordinances governing special elections for the Tribe.

Sec. 5. The Tribal Council may prescribe rules, regulations or ordinances not inconsistent with this Constitution and subject to the approval of the Secretary of the Interior, governing

future membership, adoption into membership, loss of membership, enrollment procedures, and shall maintain a current roll of all living Tribal members.

ARTICLE IV - GOVERNING BODY

Section 1. The governing body of the Tribe shall be known as the Tonto Apache Tribal Council, hereinafter referred to as the "Tribal Council."

Sec. 2. The Tribal Council shall consist of five (5) voting members: (a) a Chairman, (b) a Vice-Chairman, and (c) three (3) Council members.

Sec. 3. The Tribal Council shall select a Secretary, Treasurer and such other officials as it deems appropriate from within or without its memberships; provided, however, that only members of the Tribal Council shall vote on matters before the Tribal Council and contribute to the existence of a quorum.

Sec. 4. The terms of office of the Tribal Council shall be four (4) years for the Chairman and Vice-Chairman and two (2) years for the Council members, or until their successors are duly elected and seated. The officials selected by the Tribal Council shall serve at the sufferance of the Tribal Council.

Sec. 5. Duties of Tribal Council Members and Officials

(a) Chairman of the Tribal Council. The Chairman of the Tribal Council shall preside over all meetings of the Tribal Council, shall perform all duties of a chairman and exercise any authority given specifically by the Tribal Council or by a general meeting of the Tribe. The Chairman shall have power to vote.

(b) Vice-Chairman of the Tribal Council. In the absence of the Chairman, the Vice-Chairman shall preside and shall have all powers, privileges and duties of the Chairman. The Vice-Chairman shall have power to vote at any meeting.

(c) Secretary. The Secretary shall prepare all Tribal correspondence and shall keep accurate records concerning the meetings and business of the Tribe and Tribal Council.

(d) Treasurer.

(1) The Treasurer shall accept, receipt for, keep and safeguard all funds in the custody of the Tribal Council and shall deposit all such funds as directed by the Tribal Council. The Treasurer shall keep an accurate record of such funds and shall report on all receipts and expenditures and the amount and nature of all funds of the Tribe to the Tribal Council at regular meetings and at such other times as requested by the Tribal Council. The Treasurer shall not pay or otherwise disburse any funds in custody of the Tribe except when properly authorized to do so by the Tribal Council.

(2) The books and records of the Tribe shall be audited at least once a year by a competent auditor authorized by the Tribal Council, and at such other times as the Tribal Council may direct.

(3) The Treasurer, and other persons who are responsible for Tribal funds or funds in the custody of the Tribe, shall be bonded by a surety bond purchased by the Tribe.

(4) The Treasurer shall be present at all meetings of the Tribal Council unless otherwise excused by the Chairman.

(5) All checks shall be signed by the Treasurer and shall be countersigned by the Chairman of the Tribal Council, or in his absence by some other designated by the Tribal Council.

Sec. 6 Annual Meeting. The annual meeting of the Tribal Council shall be open to all members of the Tribe, shall be held on the second Saturday of October at 10:00 a.m. in the Tribal Office Building. Special meetings of the Tribal Council may be held at such other times and locations as may be designated by the Chairman or Tribal Council.

ARTICLE V—ELECTIONS

Section 1. Qualifications of Candidates for Elective Office.

(a) Recognizing the desirability of having powers of self-government vested in persons having a significant degree

of Indian blood, the right to hold office in Tribal government shall be afforded only to Tribal members possessing at least one-fourth (1/4) degree Apache, Tonto Apache, Western Apache, Yavapai-Tonto Apache or Yavapai-Apache Indian blood, or combination thereof.

(b) A Tribal member must be thirty (30) years of age or older to qualify for the office of Chairman or Vice-Chairman, and eighteen (18) years of age or older to qualify as Council member.

(c) All persons seeking to qualify as a candidate for Tribal Council shall have physically resided on the Reservation or land controlled by the Tribe for at least one (1) year immediately preceding the election.

(d) No person who has been convicted of a felony, or who within the last year preceding the election has been convicted of a misdemeanor involving moral integrity shall be eligible to hold office in the Council. The following misdemeanors and no others shall be considered misdemeanors involving moral integrity: adultery, bribery, embezzlement, extortion, fraud, forgery, misbranding, perjury and theft.

(e) The Tribal Council shall make the final decision on whether a candidate meets these qualifications.

Sec. 2. Qualifications of Voters.

(a) Tribal members eighteen (18) years of age or older are eligible voters in all elections.

(b) Where questions relating to the disposition of Tribal land require approval of the Tribal membership, only Tribal members residing on the Reservation or land owned by the Tribe may vote.

Sec. 3. Nominations.

(a) Any Tribal member, who meets the qualifications of Section 1 of this Article, whose name is submitted on a petition signed by at least five percent (5%) of the eligible voters of the Tribe, shall be a nominee for the office indicated

by the petition.

(b) Nomination petitions must be received by the Tribal Chairman or Tribal Secretary no earlier than thirty (30) days nor later than fifteen (15) days before the election.

(c) The names of all qualified candidates shall be posted in at least two (2) public places on Tribal land at least ten (10) days prior to the election.

(d) An eligible voter may sign only one (1) nomination petition for the office of Chairman and one (1) nomination petition for the office of Vice-Chairman.

(e) An eligible voter may sign one (1) nomination petition for each Council position to be elected for each election.

(f) Signatures of persons in violation of subsections (d) and (e) of this Section shall be disregarded in determining the regularity of a nomination.

Sec. 4. Election Procedure.

(a) All elections shall be by secret written ballot.

(b) The Tribal Council shall enact an ordinance governing the conduct of elections. Such ordinance shall be consistent with this Constitution and shall include, but not be limited to, the following provisions:

Nomination of Candidates
Secret Ballots
Absentee Voting
Settlement of Election Disputes
Handling of Petitions
Conduct of: Referendum, Initiative and Recall Elections

(c) The Tribal Council assembled in open meeting, shall, within twenty-four (24) hours after closing of the polls, receive the ballot boxes, the unused ballots, the rejected ballots, the tally sheet, and the abstract of the votes. The

abstract votes shall be read aloud to the public. Upon determining the highest number of votes for each office or Tribal seat, the Tribal Council shall certify the results and shall declare the same to be the winners of the election.

Sec. 5. Initial Tribal Council. Within sixty (60) days after the effective date of this Constitution, a meeting of the Tribal membership shall be called for the purpose of electing the initial Tribal Council, as set forth in Article IV, Section 2, and transacting such other business as may be necessary. The election shall be called and conducted by the existing Tribal government. At this election, nominations shall be accepted from the floor by verbal nomination. The Tribal Council members elected at that meeting shall be elected by secret ballot and shall serve until the second Saturday in June 1980, or until their successors are duly elected and seated. Thereafter, the Tribal Council shall be elected pursuant to Article V, Section 6.

Sec. 6. Regular Elections.

(a) Regular elections shall be held annually on the second Saturday in June, beginning in 1980.

(b) At the first regular election, a Chairman and Vice-Chairman shall be elected for terms of four (4) years; one (1) Council member shall be elected for a term of one (1) year; and two (2) Council members shall be elected for a term of two (2) years. Thereafter, Council members shall be elected in the regular election as may be necessary to fill expired and vacant positions.

(c) Should the Tribal Council fail to call a regular election, or in case a regular election has not been held, the Superintendent, Truxton Canyon Agency, is authorized to conduct such election.

Article VI—VACANCIES AND REMOVAL FROM OFFICE

Section 1. Vacancies. If any member of the Tribal Council dies, resigns or is removed from office by the Tribal Council, or is recalled, the Tribal Council shall declare that position vacant. Within thirty (30) days after a Tribal Council seat is

declared vacant, the Tribal Council shall call and hold a special election to elect a successor to fill the unexpired term. If, however, the next regular election is less than sixty (60) days from the day the Tribal Council seat is declared vacant, that seat shall be filled by a majority vote by the Tribal Council until the regular election is held.

Sec. 2. Removal.

(a) Any member of the Tribal Council may be removed from office by a majority vote of all the remaining members of the Tribal Council if, in their opinion, he is guilty of gross misconduct or gross neglect of duty.

(b) The Tribal Council shall set a date, time and place for a public hearing on the matter and shall provide written notice to the accused. Such notice shall include a statement of the specific charges against him. Such notice shall be provided at least five (5) days prior to the meeting set for the hearing.

(c) At the hearing, the accused shall be given reasonable opportunity to defend against such charges.

(d) The decision of the Tribal Council shall be final.

Sec. 3. Recall.

(a) Any elective member of the Tribal Council shall be recalled from office by a majority vote of the eligible voters voting in a special election in which at least fifty percent (50%) of the eligible voters have voted.

(b) The Tribal Council shall call and hold a recall election upon petition to the Tribal Council signed by at least fifty percent (50%) of the eligible voters.

(c) A separate petition for recall shall be drawn for each elective Council member to be considered for recall and shall contain a statement of the specific charges against such Council member.

(d) The Tribal Council shall set a date, time and place for a pubilc hearing on the matters set forth in the petitions

and shall provide written notice to each elective Council member to be considered for recall. That notice shall contain a copy of the written petition which has named such elective Council member. Such notice shall be provided at least five (5) days prior to the meeting set for the hearing.

ARTICLE VII—POWERS OF THE GOVERNING BODY

Section 1. The Tribal Council shall exercise all powers of the Tribe, subject to any limitation imposed by this Constitution or laws of the United States applicable to Indian tribes; provided, that actions of the Tribal Council shall be subject to approval by the Secretary of the Interior where such approval is required by Federal Law, or by virtue of the fact that the United States holds property in trust for the use of the Tribe.

Sec. 2. The following Tribal powers shall be exercised by the Tribal Council:

(a) To adopt regulations, ordinances, bylaws, and rules of procedure to govern the duties, responsibilities, conduct and procedures of the Tribal Council.

(b) To negotiate, make and perform contracts and agreements of any description not inconsistent with law or this Constitution, with any person, association, partnership, corporation, municipality, country, local government, county, state, the United States, or other Indian tribe, band or community.

(c) To seek, make application for and accept grants, aid or donations from any source.

(d) To manage and appropriate Tribal funds for Tribal purposes and to expend such funds in accordance with resolutions and an annual budget approved by the Tribal Council; and to manage and administer any other funds or property within the control of the Tribe for the benefit of the Tribe and its members.

(e) To enact ordinances, including, but not limited to: civil actions, crimes, law enforcement, zoning, businesses, signs, land use, environmental quality and protection,

inheritance, probate and administration of personal estates, domestic relations, protection of minors and mental incompetents, including the appointment of guardians and custodial care and adoption, the sale and use of alcoholic beverages.

(f) To remove or exclude from the jursidiction of the Tribe any non-member of the Tribe whose presence may be undesirable or injurious to the members of the Tribe.

(g) To enact ordinances governing the activities of voluntary associations consisting of members of the Tribe organized for the purposes of cooperation or other purposes.

(h) To appoint subordinate committees, commissions, board, authorities, advisory or otherwise, Tribal officials and employees not otherwise provided for in this Constitution, and to regulate subordinate organizations for economic and other purposes.

(i) To manage, protect and preserve all lands, minerals, water, wildlife and other natural resources of the lands held by the Tribe.

(j) To initiate, regulate and administer land development projects on lands owned by or within the jurisdiciton of the Tribe.

(k) To levy and collect taxes, tolls and licenses upon those living on, visiting, purchasing or doing business within the jurisdiction of the Tribe.

(l) To encumber, mortgage, lease, permit, sell, assign, manage or provide for the management of Tribal lands, interests in such lands or other Tribal assets; to purchase or otherwise acquire lands or interests in lands within or without the Reservation; and to regulate the use and disposition of Tribal property of all kinds; provided that the powers enumerated in this subsection shall be subject to the restrictions of Article II of this Constitution.

(m) To encourage and foster arts, crafts, traditions, language and culture of the Tribe.

(n) To advise, consult and negotiate with Federal, state or local governments, and other persons, on all activities which may affect the Tribe.

(o) To advise the Secretary of the Interior and other agencies or representatives of the Federal Government with regard to all appropriation estimates of Federal projects or programs affecting, or for benefit of Indians, the Tribe or its members, prior to the submission of such estimates to the Office of Management and Budget and the Congress.

(p) To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior, as long as such approval is required by Federal Law.

(q) To veto the sale, disposition, lease or encumbrance of Tribal lands, interest in lands, or other Tribal assets.

(r) To charter private or public corporations for profit or not for profit, and to enact ordinances governing the operation and conduct of such corporations.

(s) To issue bonds of any kind whatsoever, in accordance with Tribal law and the laws of the United States.

(t) To own, purchase or sell any kind of property, real, personal or intangible, not otherwise prohibited by law.

(v) To establish and regulate a judicial system.

(w) To exercise jurisdiction over all persons and activities within Tribal territory, except where such jurisdiction has been specifically restricted or preempted by Federal Law.

(x) To exercise, as to non-members, all other sovereign powers of the Tribe, whether or not enumerated in this Constitution, subject only to limitations on thoses powers expressly imposed by Federal Law.

(y) To employ accountants and consultants.

ARTICLE VIII—BILL OF RIGHTS

Section 1. All members of the Tribe shall enjoy equal rights of life, liberty and the pursuit of happiness.

Sec. 2. The Tribe, in exercising its powers of self-government, shall not:

(a) Make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people to peaceably assemble and to petition for a redress of grievances.

(b) Violate the right of the people to be secure in their persons, houses, papers and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized.

(c) Subject any person for the same offense to be twice put in jeopardy.

(d) Compel any person in any criminal case to be witness against himself.

(e) Take any private property for a public use without due process of law and just compensation.

(f) Deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, at his own expense, to have the assistance of counsel for his defense.

(g) Require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six (6) months or a fine of $500, or both.

(h) Deny to any person subject to its jurisdiction the

equal protection of its laws or deprive any persons of liberty or property without due process of law.

(i) Pass any bill of attainder or ex post facto law.

(j) Deny to any person accused of an offense punishable by imprisonment, the right, upon request, to a trial by a jury of not less than six (6) persons.

ARTICLE IX—POPULAR PARTICIPATION IN GOVERNMENT

Section 1. Initiative

Upon the Tribal Council's receipt of a petition in writing of at least thirty percent (30%) of the eligible voters of the Tribe, any enacted or proposed ordinance or resolution shall be submitted by the Tribal Council to an election of eligible voters. The eligible voters shall, by majority vote, in such election, decide whether the ordinance or resolution shall thereafter be in effect; provided, that at least thirty percent (30%) of the eligible voters shall vote in such election.

Sec. 2. Referendum

Upon the request of the majority of the members of the Tribal Council, any enacted or proposed ordinance or resolution of the Tribal Council shall be submitted by the Tribal Council to a popular referendum of the eligible voters. The eligible voters shall, by majority vote, in such referendum, decide whether the ordinance or resolution shall thereafter be in effect; provided, that at least thirty percent (30%) of the eligible voters shall vote in such referendum.

ARTICLE X—AMENDMENTS

This Constitution may be amended by a majority vote of the qualified voters of the Tribe voting in an election authorized and conducted by the Secretary of the Interior, in which at least thirty percent (30%) of those entitled to vote shall vote, but no amendment shall become effective until it shall have been approved by the Secretary of the Interior so long as the Secretary's approval is required by Federal Law or by terms of this Constitution. The Secretary of the Interior shall authorize

such election upon receipt of a written petition of at least one-third (1/3) of the eligible voters of the Tribe or a resolution of the Tribal Council adopted by an affirmative vote of a majority of all Tribal Council members.

ARTICLE XI—RESERVED POWERS

Powers enumerated in this Constitution are not exclusive and the remaining sovereign powers of the Tribe are reserved to the members of the Tribe.

ARTICLE XII—SEVERABILITY

If any provision of this Constitution shall, in the future, be declared invalid by a court of competent jurisdiction, the invalid provisions shall be severed and the remaining provisions shall remain in full force and effect.

ARTICLE XIII—ADOPTION

This Constitution, when adopted by a majority vote of the qualified voters of the Tribe, voting at a special election authorized by the Secretary fo the Interior, in which at least thirty percent (30%) of those entitled to vote shall vote, shall be submitted to the Secretary of the Interior for his approval, and shall be in force from the date of such approval.

[Excerpt from Transcript of Oral Argument in Federal District Court for the District of Arizona, September 21, 1979] *

MR. SPARKS: Therefore, we believe that in light of the facts that the Akin case dealt with, the Colorado situation where there were very few federal and Indian water rights in the case, where many, many people would have to travel great distances over the Continental Divide, the Rockies from the west slope to the east slope because the federal interest was nominal in light of the circumstances before the Court, Akin, that the Court decided in a particular situation in the light of comprehensiveness of the statutes in Colorado, that in that situation that was the proper case for the Court to refrain and refer those matters to the state adjudication.

That's not what we have before this Court. In fact, Your Honor, before this Court — we will deal with the substance of the matters in just a few moments — we have a number of questions which are preliminary to the Court's

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* Page 50, line 3 to page 58, line 12. Because of multiple transcription errors, corrections have been included in the official transcript. Words interlineated indicate deletions and bracketed material indicates additions.

discussion and evaluation of the state proceedings.

One is the Federal Enabling Act. Certainly, in the Federal Enabling Act there are a number of issues which are before the Court. Can the state ~~bring~~ [brought] into statehood upon its willingness to agree [not] to exercise jurisdiction over the land and property of Indian tribes, [and] not ~~attack~~ [to tax] it [thereafter do so].

I really enjoyed one of the suggestions by counsel that they don't understand what we are talking about in the ~~attacking~~ [taxing] situation. They don't see the facts in the state proceedings. As a matter of fact, in the original proceedings which were ~~administrated~~ [administrative] by nature, we alleged to this Court [that] there [sic] [filing fee] was an ~~attack~~ [a tax] which was, if employed against the tribe, would have meant filing our action in this single proceeding, would cost $250,000.

Over the years Congress has conditioned the entry of statehood by many states in the west, including New Mexico and California, but not Colorado. The federal Enabling Act, as a matter of fact, was also one of those cases which the Congress specifically restricted the entry of statehood. I can assure the Court that as a scholar in this particular field it is

my opinion that in those days when they were considering statehood, that it was the opinion of the state and Congress that the state would have absolutely no control over the jurisdiction, land or property of Indians within the Indian reservation. I just don't see how it can otherwise be interpreted. In the legislative history which we go into on page 17 and 18 of our motion and response to the motion to dismiss, we refer to a quote on the division of the Dakotas, which was a companion bill at the time the Arizona bill was passed:

"Reason for opposing the division of Dakota reservations, the jurisdiction over which is reserved to the United States and excluded from the territory and from the proposed states so long as Indian titles exist."

And further: "In the northern portion of Montana there are numerous Indian reservations, lands within which are excluded from the operation of the Bill."

Then in a hot debate he says: "But I want to call attention now to the peculiar provisions of this subdivision of this subsection. I cannot imagine where the gentleman from Illinois found them or what he drew from them. They are most extraordinary. Why, sir, this subdivision, if a man who has a single drop of Indian blood in his veins holds a section of land,

we cannot even lay out a highway over it. We cannot exercise any right of eminent domain over the land, no matter whether he has held it one year or 25 years or 50 years, and every man is held to be an Indian who has Indian blood in his veins and there are many such in Dakota."

Then he reads the provision: That the people inhabiting the separate proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, to all lands lying within said limits owned or held by any Indian or Indian tribes. We must have jurisdiction over these Indians to a certain extent.

We have no objection to the usual provision for the protection of Indians in their poverty, but extraordinary provisions of the character found in this deal are unjust and ought not to be made."

Congress enacted it anyway. Then it's contained in the Arizona Constitution. It contains that specific language. In 1953 the McCarran Act was passed, and I watched the case of State versus SRP [jurisdiction over Indian Tribes] being built by hundreds of pages [of argument.] [N]ot one time do we have a direct statement by the Court that there is jurisdiction over

the Indian tribes nor [that] the state can waive its disclaimer act without a Constitutional amendment or assume jurisdiction on an Indian tribe without its consent. Not one place. 28 U.S.C. 1362 provides that the District Court have original jurisdiction of all civil actions brought by any Indian tribe or band or governing body duly recognized by the Secretary of Interior wherein the matter in controversy arises under the Constitution, laws or treaties of the United States. Plaintiffs are federally recognized Indian tribes with governing bodies duly recognized by the Secretary of Interior.

In the end result, we are saying the state can adjudicate in certain situations a part of what may be the Indian water rights but not necessarily all of them. The Indian tribes in this room claim water rights from time immemorial.

THE COURT: I'm trying to understand that statement as you present it, that the state does have jurisdiction if the United States is a party where it involves the water rights of the Indians, but on the other hand you say the state has no jurisdiction to adjudicate their rights. The Court finds that somewhat inconsistent. The Court is just trying to understand what the position actually is.

MR. SPARKS: Yes, Your Honor. I think the best

analogy I can give is the situation where there is a beneficiary of a trust at a local, say Valley National Bank. In that trust there is certain property held in trust by the Bank for me. In addition, I have other property. I have that property myself and the Valley Bank has no control over it, so I'm saying there are two elements of the property right here, both are not bound by the McCarran Amendment. Only one is, only that one in a rare situation where the United States is made a party, not an Indian tribe, where that proceeding in state court is a McCarran proceeding in fact determined after extensive factual investigation by the Court, and only then if wise judicial administration would dictate that those rights be determined in state court rather than federal court.

THE COURT: Proceed.

MR. SPARKS: A few months after the McCarran — by the way, McCarran never said Indian tribes anyplace at anytime, nor did Indian tribes come up in legislative history. We talk about water rights held in trust for Indian tribes by the United States. That's the extent of the legislative history, and the brief filed by the Indian tribes are replete with citations about how Indian tribes' sovereignty and property rights are not distinguished by implication or by innuendo.

THE COURT: When you make the statement, where the McCarran Act refers to the rights of the Indians are you saying that means just individual Indians, not tribes per se?

MR. SPARKS: No. What I'm saying is that the McCarran Act doesn't refer to Indians at all. McCarran doesn't say a thing about Indians. It says the United States of America, water rights reserved by the United States of America.

THE COURT: How about Akin? Does that refer to Indians?

MR. SPARKS: Yes, Your Honor.

THE COURT: Isn't that insofar as the Court is concerned presently, that's not the Supreme Court then speaking that it does pertain to Indians?

MR. SPARKS: It pertains to the water rights held by the United States for Indians. That's what the Court spoke to in Akin.

THE COURT: Well, on page 811, legislative history demonstrates that the McCarran Amendment is to be construed as reaching federal water rights reserved on behalf of the Indians.

MR. SPARKS: Yes, federal water rights reserved on

behalf of the Indians. That means the federal Government has reserved those rights. Those rights are the ones that the McCarran Amendment gets to. That's a limited waiver of sovereign immunity on the part of the United States.

THE COURT: All right.

MR. SPARKS: Right after the McCarran Amendment was adopted, 13 months later as a matter of fact, [P]ublic [L]aw 280 was passed. In that particular law Congress, being cognizant that it just passed the McCarran Amendment, stated that there were methods to have the state assume jurisdiction over Indian land, civil and criminal jurisdiction. It stated that the methods that had been used in those cases [and it] didn't take tribal consent to do it. Certain state[s] courts in fact did that, but it said ["]that nothing in this section, amongst other things, shall authorize the alienation, encumbrance or taxation of any real or personal property, including water rights, belonging to any Indian or Indian tribe, band or community that is held in trust by the United States,["] and skipping some: ["]Or shall authorize the regulation of the use of such property in a manner inconsistent with any federal treaty, agreement["] — skipping some more: ["]Or shall confer jurisdiction upon the state to adjudicate, and probate

proceedings or otherwise, the ownership or right to possession of such property or any interest therein.[']

As a matter of fact, that was 13 months following the McCarran Amendment. It is a clear Congressional suggestion that the states didn't have the right when it came directly to Indian tribes, and moreover it said that if they are going to assume jurisdiction under this [P]ublic [L]aw 280, they are going to have to amend the Constitution where appropriate.

Arizona hasn't amended its Constitution if it would be appropriate.

A little time passed and in 1968 the Civil Rights Act was passed. Congress looked at the situation again, and again it dealt with it in almost the same way, notwithstanding the provision of any Enabling Act for the admission of the state — consent of the United States is hereby given to people of any state to amend where necessary their Constitution or statutes as the case may be and to remove other legal impediments to the assumption of civil and criminal jurisdictions in accordance with the provisions of this McCarran Amendment, provided — this is the important part — that the provision of this Act shall not become effective with respect to such assumption of jurisdiction by any such state until the people thereof have

appropriately amended their Constitution, and then the Court went on to say — I mean Congress — and have received their express permission of the Indian tribe over which the state attempts to claim jurisdiction.

Well, as a matter of fact, the state didn't amend its statutes until last year. As a matter of fact, it hasn't amended its Constitution assuming jurisdiction over any Indian land and property. Case after case after case say[s] that water rights are property. They are vested in rem rights. The state has no jurisdiction over the subject matter, the water or land and has no in personam jurisdiction over the Indian tribes.

TRANSLATION INTO ENGLISH

of the

RECOPILACION DE LEYES DE LOS REYNOS

DE LAS INDIAS

by

Gilberto Espinosa, Esq.

Colonial Spanish Editor - Ruben Cobos, Ph. D.

Prepared for the Bureau of Indian Affairs,
United States Department of Interior

PART ONE

PREFACE

This translation of certain portions of the Recopilacion de Leyes de los Reynos de Las Indios, Second Edition, as compiled in 1756 by Antonio Balbas, Madrid, Spain is from the Spanish language current during the late 17th Century reign of Charles II of Spain to contemporary mid-20th Century English.

The translation was done by Gilberto Espinosa, Esq., Attorney, Author and Historian, of Albuquerque, New Mexico; and has been edited by Dr. Ruben C. Cobos, PhD. of the Language Department of the University of New Mexico, and expert on the Spanish language used in the 16th and 17th Century colonial period. The work was monitored by Thomas A. Garrity, Jr., an Attorney on the staff of the Albuquerque Field Office of the Solicitor, United States Department of the Interior. Funds for the translation were made available by the Bureau of Indian Affairs as part of a historical-legal research study in preparation for litigation involving the adjudication and determination of water rights in the Rio Grande Stream System. Eighteen Indian Pueblos whose land title and water rights derive from Royal Grants from the sovereignties of Spain and Mexico claim and use water from the Rio Grande and its tributaries.

The translation covers Titles 1 through 15 of Book 6 of the Recopilacion which deal specifically with the Spanish Law governing the administration of the affairs, lands and property of the Indians in the New World. Other general laws which touch upon the rights of Indians generally are also included in the translation.

Albuquerque, New Mexico

August 1, 1967

Lotario D. Ortega
Field Solicitor
Dept. of Interior

COMPILATION OF THE LAWS

OF THE KINGDOMS OF THE INDIES

Printed and Published By Order of His Catholic Majesty

DON CARLOS II

Our King

Divided into Four Volumes
With a General Index, and at the Beginning of Each Volume
A Special Index of the Titles It Contains

VOLUME ONE

IN MADRID: By Antonio Balbas, 1756

SECOND EDITION

LAW EIGHT - That the judge [Oidor], who is to go out on inspection shall inform himself as to the doctrine of the Indians, their taxes and tributes.

The judge [Oidor] who is to go out to inspect the land, shall inform himself in each locality [Lugar] and Indian Pueblo, of the discipline and way of teaching Christian doctrine who teaches it, who says mass and administers the Holy Sacraments of the Church; and if anything is lacking in this respect he shall provide whatever may be needed; and, in like manner, he shall inform himself if they have any tax appraisement and if they are going too far in taking from them more than what had been appraised, and if it is too high, and if they are receiving other injuries, offenses and mistreatment, and from what persons, and if they are being forced to carry burdens, and he shall do justice and decree so that the Indians shall be indemnified, keeping and executing the laws and ordinances in every respect.

D. Felipe, II, in Madrid, July 18, 1560 and April 9, 1591.

LAW THIRTEEN - The Visitadores will make note if the Estancias are located with prejudice to the Indians and whether Justice is done.

Some Estancias that the Spaniards have for their animals have been extended with prejudice to the Indians, being located on their lands and very near to their plantings and ranches, and the result is that the animals eat and destroy the crops and do damage. We Command the Oidores to proceed to visit these lands, without first being required, and see if there is resulting damage to the Indians and their lands, and being so, there be called for hearing the interested parties whom he should proceed to briefly, and summarily, or officially, as appears proper, require removal of the herds to another location, all without prejudice to third parties.

Instructions of Viceroys of 1596,
capt. 21.

LAW SEVENTEEN - That settlement of land formerly belonging to the Indians or acquired through false titles not be accepted and attorneys and protectors shall seek justice.

To give greater protection to the Indians, and that they may not suffer any injury: We Order that settlement shall not take place in lands which the Spaniards may have obtained from the Indians against Our Royal Decrees and Ordinances, or through forged titles, because in this regard, it is Our Will that the attorney-protectors or those of the high courts [if there were no attorney-protectors], shall seek justice and law that is their due by decree and ordinance, in order to sue for nullity against similar contracts. And We Charge the Viceroys, Presidents, and High Courts, to give all assistance for its entire compliance.

D. Felipe, IV, in Zaragosa,
June 30, 1646.

LAW EIGHTEEN - That the Indians be allowed to keep their lands.

We Order that the sale, proceeds, and settlement of land be made with such consideration, that the Indians shall be given all the land [and more, if possible] that belongs to them, both as to individuals and communities alike, and, specially those lands where they may have made ditches [acequas], or any other improvement, such that with their personal industry, they have fertilized. This is to apply particularly with respect to water and irrigation. And for no reason can these lands be sold or taken away from them; and the judges who were sent for the purpose, shall make a list of the Indians found in these lands, and those [lands] that they may have turned over to each one of the taxpayers [tributarios], old men, exemptees, chiefs, governors, absentees, and communities.

D. Felipe, IV, in Madrid
March 16, 1642
Zaragoza, June 30, 1646

LAW NINETEEN - That whosoever has not had possession of the land for ten years shall not be allowed to settle it, and that Indians be given preference.

Whosoever has not had possession of the land for ten years, although he may claim that he is in possession, [for this pretext alone is not sufficient], shall not be allowed to settle said land, and the Indian communities, in relation to other interested parties, shall be granted all consideration.

D. Felipe, IV,
June 30, 1646

BOOK SIX TITLE II

OF THE LIBERTIES OF THE INDIANS

LAW ONE - That the Indians shall be free and not subject to servitude.

Pursuant to what is provided with regard to the freedom of Indians: it is Our Wish and We Command, that no Adelantado, Governor, Captain, Alcalde, or other person, whatever be his status, dignity, office or quality, may either in time of peace or war, although it be a just one, ordered and waged by us or whoever had our authority, be so barbarous as to capture native Indians of our Native Indies, Islands or the Mainland of the Ocean-Sea, discovered or to be discovered, or to hold them as slaves although they be from the Islands and Lands against whom we have or by those having our authority have declared that just war may be made against them or kill, take or capture them; except in cases and nations who under the laws in this title it is permitted and provided, for which reason, all the licenses and declarations to this day made, that are not recompiled and those which given and made, not being given and made by Us, with express mention of this law, we revoke and suspend, in all that relates to enslaving Indians in war even though it be just, and tney may have given cause or give cause for it, and to the freeing of those other Indians have captured during the wars they have among themselves. And in like manner We Command, that no person in war or out of it, may take, apprehend, or control, sell or exchange, as a slave, any Indian, or hold him as such, with the pretext that he took him in a just war, nor buy, redeem bring or exchange or any other, for any other cause, even though he be of those Indians that the natives themselves, had held, or have, with them as slaves under penalty if anyone be found who captured as or holds as slave an Indian, he incurs the loss of all his property, forfeited to our Camara and Treasury, and the Indian or Indians shall forthwith be returned and restored to their proper lands and natural state, with full and natural liberty and at the expense of those who thus captured them or held them as slaves. And We Order Our Justices to have special care to inquire into and punish with vigor, according to this law, under penalty of depriviation of their offices and one hundred maravedis for our Camara, to him who does the contrary and be negligent in his

compliance.

The Emperor D. Carlos, in Granda,
November 9, 1526,
in Madrid, August 2, 1530,
in Medina del Campo,
January 13, 1532,
in Madrid, November 5, 1540,
in Valladolid, May 21, 1542,
in Castellon de Ampurias,
October 24, 1548.

LAW EIGHT - That Reducciones be made in conformity with this law.

The locations where there are to be established the Pueblos, and Reducciones, shall have sufficient waters, lands and woods, entrances and exits, and farm lands and an Exido [Commons] a league in length where the Indians may keep their livestock without their mingling with that of the Spaniards.

D. Felipe, II, in El Prado
December 1, 1573
D. Felipe, III, in Madrid
October 10, 1618.

LAW NINE - The lands the reducidos Indians formerly owned, shall not be taken from them.

The Indian population will be resettled voluntarily and with more dispatch if they are not deprived of the lands and farmlands that they own in the locations they leave: We Order that no pretense be had in this and they retain them as they formerly had them so they may cultivate them and work their improvement.

D. Felipe, II, in Toledo,
February 19, 1560.

AMENDED
CONSTITUTION AND BYLAWS
OF THE
SAN CARLOS APACHE TRIBE OF ARIZONA

The Constitution and Bylaws of the San Carlos Apache Tribe of the San Carlos Reservation, Arizona, is amended as follows:

PREAMBLE

We, the people of the San Carlos Apache Tribe of the San Carlos Reservation, Arizona, in order to exercise the duties and responsibilities of a representative tribal government, do ordain this Constitution and Bylaws.

ARTICLE I—STATEMENT OF PURPOSE

SECTION 1. In our relation to the United States Government, a relation similar to that which a town or a county has to State and Federal governments, our own internal affairs shall be managed, insofar as such management does not conflict with the laws of the United States, by a governing body which shall be known as the San Carlos Council.

ARTICLE II—TERRITORY

SECTION 1. The authority of the San Carlos Apache Tribe shall extend to all of the territory within the boundaries of the San Carlos Reservation and to all lands which may be acquired for the Tribe or which the Tribe may acquire for itself.

ARTICLE III—MEMBERSHIP

SECTION 1. The membership of the San Carlos Apache Tribe shall consist of:

(a) All persons who are members of the Tribe on the date when this revised constitution is finally approved.

(b) All children of one-fourth or more San Carlos Apache Indian blood who are born to resident members, and all children of one-fourth or more San Carlos Apache blood born to non-resident members if such non-resident members declare their intention of maintaining membership in the Tribe. The method of declaring intention of membership shall be determined by ordinance of the Council.

(c) The Council shall have the power to pass ordinances, subject to review by the Secretary of the Interior or his authorized representative, governing future membership, loss of membership, and the adoption of members by the San Carlos Apache Tribe.

ARTICLE IV—GOVERNING BODY

SECTION 1. The governing body of the San Carlos Apache Tribe shall be known as the San Carlos Council and shall consist of a chairman, vice-chairman and nine members to be chosen as follows:

Chairman, by popular vote of the Tribe;
Vice-Chairman, by popular vote of the Tribe;
Three members, by popular vote of the Bylas District;
Two members, by popular vote of the Gilson District;
Two members, by popular vote of the Peridot District;
Two members, by popular vote of the Seven Mile District.

SEC. 2. Districts Defined. For purposes of voting and representation on the Council, the districts shall be defined as follows:

BYLAS DISTRICT shall include all members living in the entire Bylas Community;

GILSON DISTRICT shall include all members living on Gilson Wash west and south of Quarry Wash and north of the Farm Station;

PERIDOT DISTRICT shall include all members living in the community south of the Farm Station and on both sides of the San Carlos River;

SEVEN MILE DISTRICT shall include all members living within the area east of the Quarry Wash and north of the point where the Quarry Wash runs into the San Carlos River.

SEC. 3. Organization of Council. The Council shall choose, either from within its own membership or from the outside, a secretary, a treasurer, and such other officers as it may consider necessary.

SEC. 4. The Council, from time to time, may by ordinance change the foregoing number and distribution according to the growth of population.

SEC. 5. First Election. The first election of councilmen under this amended constitution and bylaws shall be held on the next regular election date following the adoption and ratification of the amended constitution and bylaws. In the first election the candidate in each district receiving the highest number of votes shall hold office for two years. In each regular election thereafter one candidate shall be elected from each district and shall hold office for a term of four years, except in the Bylas District which shall elect two candidates at every other election, such candidates to hold office for four years.

SEC. 6. Term of Council Members. Members of the Council shall take office on the first Tuesday of the first month after their election.

SEC. 7. Council Chairman and Vice-Chairman. The Chairman and Vice-Chairman of the Tribal Council shall be elected for a term of four years by popular vote of the Tribe. Candidates for such office shall possess the qualifications required of candidates for Council membership, as set forth in Article II of the Bylaws, except as to residence. The candidates for Chairman and Vice-Chairman need only be residents of the San Carlos Reservation. Such elections shall be held under the same rules as the election for council members and the Chairman and Vice-Chairman of the Tribal Council shall take office on the same day that the council members take office.

ARTICLE V—POWERS OF THE COUNCIL

SECTION 1. The San Carlos Council shall have the following powers:

(a) To represent the Tribe and act in all matters that concern the welfare of the Tribe, and to make decisions not inconsistent with or contrary to this Constitution and Bylaws or the Constitution and Statutes of the United States;

(b) To negotiate and make contracts with the Federal, State and local governments;

(c) To advise the Secretary of the Interior or his representative on all activities that may affect the San Carlos Reservation, and on all appropriation estimates and Federal projects for the benefit of the Tribe before such estimates and projects are submitted to the Bureau of the Budget and to Congress;

(d) To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior, so long as such approval is required by Federal law;

(e) To veto the sale, disposition, lease or encumbrance of tribal lands, interest in lands, tribal funds or other tribal assets that may be authorized by any agency or employee of the government;

(f) To protect and preserve the wildlife and natural resources of the Tribe; to regulate hunting and fishing on the reservation;

(g) To cultivate Indian arts, crafts and cultures;

(h) To administer charity;

(i) To regulate the uses and disposition of tribal property and funds, provided, that any grant or lease of any portion of the Reservation for grazing purposes or relinquishment of any water rights on the Reservation must be authorized by a two-thirds majority of tribal votes cast in an election

called by the tribal council for that purpose and, provided further, that the total vote cast shall be not less than three-fifths of the total eligible voters;

(j) To manage all tribal economic affairs and enterprises in accordance with the terms of the Corporate Charter of the Tribe;

(k) To levy and collect taxes;

(l) To appropriate tribal funds for public purposes;

(m) To enact ordinances, subject to review by the Secretary of the Interior, establishing and governing tribal courts and law enforcement on the Reservation; regulating domestic relations of members of the Tribe, but all marriages shall be in accordance with State laws; providing for appointment of guardians for minors and mental incompetents; regulating the inheritance of real and personal property of members of the Tribe within the Reservation; and providing for the removal or exclusion from the Reservation of any non-member of the Tribe whose presence may be injurious to the people of the Reservation;

(n) To enact ordinances governing the activities of voluntary associations consisting of members of the Tribe organized for purposes of cooperation or other purposes;

(o) To regulate its own procedures; to appoint subordinate committees, commissions, boards, tribal officials and employees not otherwise provided for in this Constitution and Bylaws, and to prescribe their salaries, tenure and duties; to charter and to regulate subordinate organizations for economic and other purposes;

(p) The Council may exercise such further powers as may be delegated to the San Carlos Apache Tribe by the Secretary of the Interior or by any other qualified official or agency of the Government;

(q) The foregoing enumeration of powers shall not be construed to limit the powers of the San Carlos Apache Tribe, and such powers may be exercised through the adoption of bylaws or constitutional amendments.

ARTICLE VI—REVIEW BY THE SECRETARY

SECTION 1. Any resolution or ordinance which, by the terms of this constitution, is subject to review by the Secretary of the Interior, shall be presented to the Superintendent of the Reservation within six days after the passage by the Council. The Superintendent shall, within six days after its receipt, approve or disapprove the same.

If the Superintendent shall approve any ordinance or resolution, it shall thereupon become effective, but the Superintendent shall transmit a copy of the same, bearing his endorsement and the date his signature was affixed thereto, to the Secretary of the Interior, who may, within 90 days from the date of enactment, rescind the said ordinance or resolution for any cause, by notifying the council of such rescinsion [sic]. If the Secretary shall fail to act within the 90-day period, the ordinance or resolution shall remain in effect as of the date of the Superintendent's approval.

If the Superintendent shall refuse to approve any resolution or ordinance submitted to him, within six days after its receipt, he shall advise the Council of his reasons therefor. If these reasons appear to the tribal council insufficient, it may, by a majority vote, refer the ordinance or resolution to the Secretary of the Interior, who may, within 90 days from the reenactment date approve the same in writing, whereupon the said ordinance or resolution shall become effective.

ARTICLE VII—RIGHTS OF MEMBERS

SECTION 1. All members of the San Carlos Apache Reservation shall be accorded equal political rights and equal opportunities to participate in the economic resources and activities of the tribe, and no person shall be denied freedom of conscience, speech, association or assembly or the right to petition for the redress of grievances.

ARTICLE VIII—ELECTIONS

SECTION 1. Regular Elections. Regular elections to vote for councilmen shall be held every two years on the first

Tuesday in April. Regular elections to vote for Chairman and Vice-Chairman shall be held every four years on the first Tuesday in April.

SEC. 2. Special Elections. Special elections shall be held upon call by the Tribal Council as provided in Article IX, and notice of them shall be given as in the case of general or regular elections.

SEC. 3. Notice. All elections shall be announced by special notice posted at least thirty days before the election at the voting places and other convenient public places.

SEC. 4. The voting places shall be: one at San Carlos Agency and another at Bylas and others as may be established by the Council.

SEC. 5. Candidates. Names of candidates nominated by the districts for their councilmen shall be posted for a period of at least twenty days prior to election.

SEC. 6. Nomination of Chairman and Vice-Chairman. At least twenty days before nominations of candidates for council membership are made at district meetings, not more than four candidates nor less than two for each office of Chairman and Vice-Chairman shall be nominated at a general mass meeting called for that purpose.

SEC. 7. Nomination of Council Members. Nominations shall be made at mass meetings of the respective districts for the office of councilman. Each district shall nominate at least four candidates for each position of councilman.

SEC. 8. Manner of Voting. All elections shall be by written ballot. The council shall have power to prescribe ordinances governing the casting and canvassing of ballots, the manner of conducting district meetings for nomination, and other necessary details of election procedures covering elections of councilman and officers and referendum elections.

ARTICLE IX—REMOVAL FROM OFFICE

SECTION 1. Forfeiture of Office. If a Chairman or Vice-Chairman or member of the Council fails or refuses to attend two regular meetings in succession unless excused due to illness or other causes for which he cannot be held responsible, or shall be convicted of a felony or of a misdemeanor involving moral integrity, his office shall be forfeited and a special election called by the Council shall be held to replace him.

SEC. 2. Removal from Office. If a Chairman or Vice-Chairman or member of the Council shall fail in the performance of the duties assigned to him, he may be subject to recall. The Council may by a two-thirds vote, after affording the accused member a fair opportunity to be heard in his own defense, require such member to stand for reelection of the district which he represents.

SEC. 3. Resignation and Replacement. Any councilman resigning or by death taken out of his office shall be replaced only by a special election in the respective district.

ARTICLE X—RESERVATION LAND

SECTION 1. The reservation land shall as a whole remain tribal property and shall not be divided by allotment of any parts to individuals or groups of individuals as private property that could be sold at will; but assignment of land for private use may be made by the council in conformity with ordinances which may be adopted on this subject, provided, that the rights of all members of the tribe be not violated.

ARTICLE XI—REFERENDUM

SECTION 1. Upon a petition of at least fifty percent of the eligible voters of the Tribe, or upon the request of the majority of the members of the Tribal Council, any enacted or proposed ordinance or resolution of the Tribal Council shall be submitted by the Council to a popular referendum and the vote of the majority of the qualified voters in such referendum shall decide whether the ordinance or resolution shall thereafter be in effect and subject to Secretarial review where such review

is required: Provided, that one-half or more of the eligible voters shall vote in such referendum.

ARTICLE XII—AMENDMENTS

SECTION 1. This Constitution and Bylaws may be amended by a majority vote of the qualified voters of the Tribe voting at an election called for that purpose by the Secretary of the Interior, provided, that at least thirty percent of those entitled to vote shall vote in such election; but no amendment shall become effective until it shall have been approved by the Secretary of the Interior.

It shall be the duty of the Secretary of the Interior to call an election on any proposed amendment at the request of the Council, or upon receipt of a petition signed by one-third of the qualified voters of the Tribe.

BYLAWS OF THE SAN CARLOS APACHE TRIBE OF ARIZONA

ARTICLE I—DUTIES OF OFFICERS

SECTION 1. Chairman of the Council. The Chairman of the Council shall preside over all meetings of the Council, shall perform all duties of a Chairman and exercise any authority given him specifically by the Council or by a general meeting of the Tribe. The Chairman shall have power to vote.

SEC. 2. Vice-Chairman. In the absence of the regular Chairman the Vice-Chairman shall preside and shall have all powers, privileges and duties of the Chairman. He shall have power to vote at any meeting.

SEC. 3. Secretary. The secretary shall conduct all tribal correspondence and it shall be his duty to submit promptly to the Superintendent of the jurisdiction and other appropriate offices of the Bureau of Indian Affairs, copies of all minutes of regular and special meetings of the Council.

SEC. 4. Treasurer. (a) The Treasurer shall accept, receipt for, keep and safeguard all funds in the custody of the Council. He shall deposit all such funds as directed by the San

Carlos Council and shall keep an accurate record of such funds and shall report on all receipts and expenditures and the amount and nature of all funds in his custody to the Council at regular meetings and at such other times as requested by the Council. He shall not pay or otherwise disburse any funds in custody of the Council except when properly authorized to do so by the Council.

(b) The books and records of the treasurer shall be audited at least once a year by a competent auditor employed by the Council, and at such other times as the Council may direct.

(c) The treasurer shall be required to give a surety bond satisfactory to the Council and the Commissioner of Indian Affairs or his authorized representative.

(d) The treasurer shall be present at all meetings of the Council unless prevented by circumstances beyond his control.

(e) All checks shall be signed by the treasurer and shall be countersigned by the Chairman of the Council, or in his absence by some other officer designated by the Council.

ARTICLE II—QUALIFICATIONS OF COUNCILMEN

SECTION 1. Any member of the Tribe who is not employed by the Federal or State government, who has reached the age of twenty-five years, who is a resident of the district which he is to represent, and who is able to read and write, shall be qualified to be a candidate for election to the Council. No person who has been convicted of a felony, or who within the last year preceding the election has been convicted of a misdemeanor involving moral integrity shall be eligible to hold office in the Council. The following misdemeanors and no others shall be considered misdemeanors involving moral integrity: adultery, bribery, embezzlement, extortion, fraud, forgery, misbranding, perjury and theft.

ARTICLE III—MEETINGS OF THE COUNCIL

SECTION 1. First Meeting. At the first meeting of the Council after a regular election, the Council shall see that all members have a correct and clear understanding of the Constitution and Bylaws and the management of the tribal and reservation affairs, as well as the rules for the conduct of their own body.

SEC. 2. Regular Meeting. The Council shall meet officially on regular meeting dates which shall be on the first Tuesday in each month at nine o'clock a.m. In case the time of the regular Council meeting on the first Tuesday of each month should conflict with a national, state or tribal election, or shall fall on a holiday, the meeting shall be held on the following Wednesday.

SEC. 3. Special Meetings. Special meetings of the Council may be called by the Chairman, or the Chairman shall call a special meeting upon written request of three or more members of the Council.

SEC. 4. Conduct of Business. In the conduct of business, recognized rules of order shall apply. Voting at the Council meeting may be by voice, but at the discretion of the Chairman or upon the request of any two members of the Council a secret vote shall be taken.

SEC. 5. Quorum. Matters of business for the Council shall be decided by a majority vote. A quorum (a number competent to transact business) of the Council shall be constituted if six or more members are present.

SEC. 6. Restriction of voting in the Council. In any matter coming before the Council which involves the Indian Bureau or any person or company, no member of the Council that may be permanently connected with the party so involved shall be permitted to vote without the special consent of the remaining members of the Council.

ARTICLE IV—MEETINGS OF THE TRIBE

SECTION 1. The Council shall from time to time call meetings of all voters of the Tribe to lay before them such matters as may come before such a general meeting. A general meeting of the Tribe shall be called upon request of a majority of the qualified voters of any district.

ARTICLE V—LAW AND ORDER

SECTION 1. It shall be the duty of the Council to provide through the necessary bylaws or ordinances for the establishment of a tribal court upon the reservation.

SEC. 2. This court shall have jurisdiction of such petty offenses, not falling within the exclusive jurisdiction of the Federal or State courts, as may be enumerated in the ordinances or bylaws of the Tribe.

SEC. 3. This court shall have jurisdiction over all disputes between Indians on the reservation, and over such disputes between Indians and non-Indians as may be brought before the court by stipulation.

SEC. 4. The duties, jurisdiction, and procedure of this court shall be more fully set forth by bylaws or ordinances.

SEC. 5. The judges of this court shall be appointed by the Tribal Council.

SEC. 6. It shall be the duty of the Council to establish by ordinances a tribal police force. Such ordinances shall outline in detail the authority and duties of such tribal police force and the manner in which such police force shall be selected by the Council.

ARTICLE VI—FEDERAL EMPLOYEES

SECTION 1. The Council shall request the Superintendent to furnish it with the names of all civil service probationers or temporary employees under civil service regulations on the San Carlos Reservation that are nearing the end of their probationary periods, and shall advise with the Superintendent

in the matter of their being given permanent positions as civil service employees on the Reservation.

ARTICLE VII—ADOPTION

SECTION 1. This revised Constitution and Bylaws, when adopted by a majority vote of the qualified voters of the San Carlos Apache Tribe of the San Carlos Reservation, voting at a special election called by the Secretary of the Interior, in which at least thirty percent of those entitled to vote shall vote, shall be submitted to the Secretary of the Interior for his approval, and shall be in force from the date of such approval.

CERTIFICATION OF ADOPTION

Pursuant to an order approved December 15, 1953, by the Assistant Secretary of the Interior, the foregoing amended Constitution and Bylaws of the San Carlos Apache Tribe was submitted for adoption to the qualified voters of the San Carlos Apache Tribe and was on February 23 and 24, 1954, duly ratified by a vote of 405 for, and 402 against, in an election in which at least 30 percent of a total of 1,606 eligible voters cast their ballots in accordance with Section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378).

JESS J. STEVENS
Acting Chairman, San Carlos Tribal Council

ROBERT KEY
Acting Secretary, San Carlos Tribal Council

THOMAS H. DODGE
Superintendent, San Carlos Agency

APPROVAL

I, Douglas McKay, Secretary of the Interior of the United States of America, by virtue of the authority granted me by the Act of June 18, 1934 (48 Stat. 984), as amended, do hereby approve the attached amended Constitution and Bylaws

of the San Carlos Apache Tribe of the San Carlos Reservation, Arizona, to be effective as of February 24, 1954, the date of the ratification election.

Approval recommended:

GLENN L. EMMONS
Commissioner of Indian Affairs

DOUGLAS McKAY
Secretary of the Interior
[SEAL]

WASHINGTON, D.C., April 19, 1954.

IN THE SUPERIOR COURT

MARICOPA COUNTY, STATE OF ARIZONA

IN RE:	THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE GILA RIVER SYSTEM AND SOURCE	) W-1 (Salt)) W-2 (Upper Gila)) W-4 (San Pedro),) Consolidated.

MOTION TO DISMISS

The United States moves this Court for an order dismissing this action pursuant to Arizona Rule 12(b) on the grounds that the Arizona Enabling Act and the Arizona Constitution contain disclaimers of jurisdiction over Indian property, that the present proceeding is not a judicial proceeding within the meaning of the McCarran Amendment, and that the Department of Water Resources is disqualified from acting as the Court's technical advisor. The reasons in support of the Motion to Dismiss are set forth in the Memorandum in support filed herewith.

Respectfully submitted,

STEVEN E. CARROLL
Attorney
Department of Justice
Land & Natural Resources Division
10th and Pennsylvania Ave., N.W.
Washington, D.C. 20530

IN THE SUPERIOR COURT

MARICOPA COUNTY, STATE OF ARIZONA

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MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Statement

The United States has previously informed the Court and the parties that it perceives several jurisdictional defects which it would raise at the appropriate time in these cases. One of the ambiguities in this matter has been clarified by the orders of this Court defining which specific claims of the United States need to be filed.

The United States now makes its jurisdictional objections. It is important that the question of the adequacy of these proceedings to determine fairly the water rights of the parties involved be determined as early as possible. There seems to be little point in expending huge amounts of time and money in complex litigation unless it is determined that the Court has jurisdiction to ultimately enter a decree. In addition, it seems to the United States that any decree that

may eventually be entered here would be less vulnerable to collateral attack if these jurisdictional issues are litigated fully at the outset of this litigation.

Issues Presented

1. Whether the disclaimer clause contained in the Arizona Constitution and the Arizona Enabling Act oust this Court of jurisdiction over Indian water rights.

2. Whether the administrative characteristics of this proceeding preclude joinder of the United States under the McCarran Amendment.

3. Whether the Department of Water Resources can serve as the Court's technical advisor in this case because the Department and its director are not impartial concerning the claims of the United States for water for Indian tribes.

Argument

I. The Disclaimer Provisions In Arizona's Enabling Act and Constitution Prohibit This Court From Exercising Jurisdiction Over The Tribes' Reserved Water Rights.

Section 20 of the Arizona Enabling Act, Act of June 20, 1019, 36 Stat. 569, and paragraph 4 of Article XX of the Arizona Constitution, provide that the state forever disclaims all right and title to lands held or owned by any Indian or Indian

tribes, and that until such title is extinguished by the United States, Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.[1] These authorities further state that their provisions are irrevocable without the consent of the United States and the people of Arizona. It is arguable whether or not Congress waived the prohibition against state jurisdiction in Arizona's Enabling Act relative to Indian water rights. (See discussion, p.9, infra.) There is no question, however, that the State of Arizona has not removed from its constitution the prohibition as it affects state court jurisdiction over Indian water rights.

Examination of the history of disclaimer provisions in general as well as the manner in which courts have treated such language is instructive as to the meaning and effect of

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[1]This is simply the continuation of a long-standing policy of the United States to retain jurisdiction over Tribes to itself and to bar state jurisdiction. One example of this policy is the Treaty with the Apache Tribe, 10 Stat. 979, 981 (1953), which states:

> "Said Nation or Tribe of Indians through their authorized Chiefs aforesaid do hereby acknowledge and declare that they are lawfully and exclusively under the laws, jurisdiction, and government of the United States of America, and to its power and authority they do hereby submit."

the disclaimer provisions in Arizona's Enabling Act and constitution.

The notion of federal jurisdiction and control over Indian lands[2] conveyed by disclaimer language was not a new one when Arizona entered the Union. From the very beginning of this Nation's history, jurisdiction over Indians and Indian lands has been treated as outside the scope of the usual exercise of state authority. Worcester v. Georgia, 31 U.S. (Pet.) 515 (1832); Rice v. Olson, 324 U.S. 786, 789 (1945); McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973).

Jurisdictional disclaimer provisions like the ones in Arizona's enabling legislation have long been looked to and relied on by the Supreme Court in holding that states lack jurisdiction over Indians and Indian lands. Fisher v. District Court, 424 U.S. 382, 386 and n. 8 (1976) (Tribal Court has exclusive jurisdiction over an Indian adoption proceeding arising on a Montana Reservation); McClanahan v. Arizona Tax Commission, 411 U.S. 164, 175-176, n. 15 and 177-178 (1973) (state lacks power to tax the income of Indians who live and work on the Reservation); Warren Trading Post v. Arizona Tax Commission, 380 U.S. 685, 587 n. 3 (1965) (state lacks power to levy a sales tax on transactions between a licensed Reservation

trader and Reservation Indians); Williams v. Lee, 358 U.S. 217, 222-223 and n. 10 (1959) (state court lacks jurisdiction of a civil suit against Reservation Indians for goods sold to them by a non-Indian business on the Reservation); Williams v. United States, 327 U.S. 711, 714-715 n. 10 (1946) (state lacks criminal jurisdiction over offense committed by a non-Indian against an Indian); United States v. Chavez, 290 U.S. 357, 360 and 365 (1933) (state lacks criminal jurisdiction over non-Indian charged with larceny within Indian Reservation); United States v. Sandoval, 231 U.S. 28, 36-38 (1913) (state lacks power to prosecute non-Indian for introducing intoxicating liquor into Indian country); United States v. Sutton, 215 U.S. 291, 295 (1909) (state lacks power to prosecute non-Indians for introducing intoxicating liquor into Indian country); and United States v. Rickert, 188 U.S. 432, 440-441 (1903) (state lacks power to tax allotted Indian lands).[3]

The effect of Indian jurisdictional disclaimers as

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[3]The only situations where disclaimer clauses have not precluded state jurisdiction is where a non-Reservation setting is involved (see Kake v. Egan, 369 US. 60 (1962); McClanahan v. Arizona Tax Commission, 411 U.S. 164, 176 n. 15 (1973)) or where the matter involves a crime committed by a non-Indian against another non-Indian (see Draper v. United States, 164 U.S. 240 (1896)).

precluding state courts from exercising jurisdiction over Indian lands was specifically recognized by Congress when it enacted Public Law 83-280, 67 Stat. 588 (1953). Sections 2 and 4 of Public Law 280, codified as 28 U.S.C. 1360(a) and 18 U.S.C. 1162(a), authorized certain states to exercise limited jurisdiction over civil causes of action and criminal offenses in Indian country. States such as Arizona whose constitutions or statutes contained organic law disclaimers over Indians and Indian lands were required to take additional steps to remove the "legal impediment" to the assumption of such jurisdiction. These states were dealt with in Section 6.[4] Section 6 of the Act provides:

> "Not withstanding the provisions of any Enabling Act for the admission of a state, the consent of the United States is hereby given to the people of any state to amend, where necessary, their state constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act; provided, that the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such state until the people have appropriately amended their state constitution or statutes as the case may be. (emphasis added)

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[4]The non-disclaimer states were dealt with in Section 7.

Congress found this provision to be necessary because:

> "Examination of the federal statutes and state constitutions has revealed that the enabling acts for eight states, and in consequence the constitutions of those states, contain express disclaimers of jurisdiction. Included are Arizona, Montana, South Dakota, Utah and Washington. Effect of the disclaimer of jurisdiction over Indian land within the borders of these states — in the absence of consent being given for future action to assume jurisdiction — is to retain exclusive federal jurisdiction until Indian title in such lands is extinguished; such state could, under the bill as reported, proceed to amendment of their respective organic laws by proper amending procedure. S. Rep. No. 669, 83rd Cong., 1st Sess. 6 (1953). (emphasis added)

Thus, Section 6 mandates that the assumption of jurisdiction by courts of disclaimer states requires three measures: (1) waiver by the United States of the prohibitions of the federal enabling acts; (2) consent of the United States for the states to remove the disclaimers in their constitutions or statutes; and (3) finally, the people of the states must actually remove the impediments. See S. Rep. No. 669, 83rd Cong., 1st Sess. 6 (1953); 99 Cong., Rec. 10782 (1953). The 1968 Amendment to Public Law 280 added a fourth requirement that the affected Indians must consent to the state's assumption of jurisdiction. (25 U.S.C. 1326).

In Washington v. Yakima Indian Nation, 439 U.S. 463 (1979), the Supreme Court held that the phrase "notwithstanding the provisions of any Enabling Act . . ." in Section 6 of Public Law 280 satisfied the first two measures mentioned above. In other words, that phrase manifested an intent on the part of Congress to remove any federal impediments in state enabling acts to state assumption of civil and criminal jurisdiction over Indian Reservations in accordance with the terms of Public Law 280. The remaining impediments to assumption of jurisdiction by a disclaimer state under Public Law 280 after the Yakima case, are state impediments (failure to amend the constitution or statute, as the case may be) and after 1968, failure to obtain tribal consent by the affected Indians.

The authorization for state courts to assume jurisdiction over "civil causes of action" in Public Law 280, however, specifically excludes state adjudication of Indian property rights, including water rights. 28 U.S.C 1360(b). Hence, we must look elsewhere to determine if Congress has acted to remove the federal impediments to the assumption of state jurisdiction over the adjudication of Indian property interests and more specifically water rights.

It is the McCarran Amendment which opened the door

for state court jurisdiction over federal and Indian water rights. United States v. District Court for Eagle County, 401 U.S. 520 (1971); Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976) (Akin). But, unlike Public Law 280, the disclaimer clauses in state enabling acts are not even mentioned in the McCarran Amendment. Thus, the obvious conclusion is that Congress, in enacting the McCarran Amendment, did not waive the prohibition in the enabling acts against state jurisdiction over Indian water rights. An implicit repeal of the prohibitions cannot be ascribed to Congress for several reasons. First, there is a "cardinal rule that repeals by implication are not favored." Morton v. Mancari, 417 U.S. 535, 549 (1974); TVA v. Hill, 437 U.S. 153 (1978). Second, there is nothing in the legislative history of the McCarran Amendment which gives the slightest indication that Congress thought the statute repealed the disclaimer provisions in the various state enabling acts. And finally, if Congress, in enacting the McCarran Amendment, intended to remove the federal impediments to the assumption of jurisdiction over Indian water rights by disclaimer states, it knew well how to accomplish such a result. See Bryan v. Itasca County, 426 U.S. 373, 389 (1976).

Furthermore, the McCarran Amendment and the disclaimer provisions are capable of co-existence. Indeed, in applying the McCarran Amendment, the courts must consider the effect of any relevant language precluding the assumption of state court jurisdiction. In Morton v. Mancari, supra, the Court states that:

> "In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable. 417 U.S. at 550.

And that:

> The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. 417 U.S. at 551.

Here, the way to give effect to both the McCarran Amendment and the disclaimer clauses is to hold that the McCarran Amendment's waiver of sovereign immunity encompasses suits for the adjudication of Indian water rights but that such suits must take place in the federal courts in disclaimer states.[5]

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[5]The question of the effect of the McCarran Amendment on the federal enabling acts with disclaimer clauses is presently (Cont.)

Moreover, assuming arguendo that the McCarran

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on appeal in several cases before the United States Ninth Circuit Court of Appeals. Northern Cheyenne Tribe, etc. et al., v. Thomas Adsit, et al., Nos. 79-4887, 80-3028, 80-3032, 80-3038, 80-3040, 80-3041, 80-3042, 80-3044, 80-3045, 80-3061, 80-3061, 80-3062, 80-3063; Salt River Pima-Maricopa Indian Community v. Arizona, et al., No. 80-5189; San Carlos Apache Tribe v. Arizona, et al., No. 80-5137; Payson Community of Yavapai-Apache Indians v. Arizona, et al., No. 80-5138; Fort McDowell Mojave-Apache Indian Community v. Salt River Valley Water Users Assoc., No. 80-5219; and Navajo Nation v. United States, State of Arizona, et al., Nos. 80-5471 and 80-5837. The United States Tenth Circuit Court of Appeals in the case of Jicarilla Apache Tribe v. United States, 601 F.2d 1116 (10th Cir. 1979), Cert. denied, U.S. _____ ( ), recently accepted the contention that the McCarran Amendment waived or repealed disclaimer language in federal enabling acts despite its failure to do so expressly. The Jicarilla court held that the McCarran Amendment constitutes "implicit modification" of New Mexico's enabling act to the extent necessary to allow state court jurisdiction over Indian water rights in New Mexico. See State of New Mexico ex rel. Reynolds v. Lewis, 88 N.M. 636, 545 P.2d 10104 (1976), contra Chino v. Chino, 90 N.M. 204, 561 P.2d 476 (1977). But the analysis in that case is subject to substantial question. The Tenth Circuit mistakenly assumed Colorado had disclaimer provision. 601 F.2d at 1129, and therefore that Akin resolved the issue. But Akin did not reach the disclaimer issue because Colorado does not have disclaimer provisions in its enabling act, constitution or state code. Moreover, the Tenth Circuit erroneously relied on Kake v. Egan, 369 U.S. 60 (1962), to hold that disclaimers are limited to matters of a proprietary nature. 601 F.2d at 1133. This holding ignores the specific language of the Washington and New Mexico enabling acts and the state constitutions in which the people of the respective states expressly disclaim "all right and title . . . to all lands . . . owned or held by an Indian or Indian Tribe" and, in addition, "agree and declare that . . . said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." (emphasis added) It is also inconsistent with Public Law 280 and with long standing case (Cont.)

Amendment may be treated as an implicit waiver of the federal impediments to the assumption of state court jurisdiction over Indian rights, it is plain that the State of Arizona has not acted to remove the bar to its jurisdiction over such rights. This Court must determine whether a constitutional amendment is necessary in order to repeal the clause in the Arizona Constitution or whether " . . . for the purposes of the repeal of the [disclaimer clause] of the [Arizona] constitution legislative action is sufficient." (Yakima, supra, 439 U.S. at 493). The United States asserts that such a constitutional amendment is necessary to repeal the Arizona disclaimer, and that such an amendment has not been made.

The case of Francisco v. State, 113 Ariz. 427, 556 P.2d 1 (1976), was a paternity action brought in Arizona Superior

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law (previously cited) holding that disclaimers preclude the states from exercising governmental jurisdiction over Indians and Indian land. Furthermore, reliance on Kake v. Egan, supra, for a contrary position is misplaced. Subsequent to that decision, the Supreme Court in the case of McClanahan v. Arizona Tax Commission, 411 U.S. 164, 176 n. 15 (1973), made clear that its holding in Kake is limited only to non-Reservation situations. While the Jicarilla court acknowledges the language in McClanahan, the court's implication that there must be affirmative legislation exempting Indian Reservations from state jurisdiction is unjustified, 601 F.2d at 1134. The proper test is that there must be affirmative legislation authorizing state jurisdiction over Indians and Indian property. Bryan v. Itasca County, 426 U.S. 373, 376 n. 2 (1976).

Court by a Papago Indian. Service of process was made by state police officers on the Papago Indian Reservation. The court concluded that ". . . Arizona has no authority to extend the application of its laws to an Indian Reservation." Francisco v. State, supra, 556 P.2d at 5.

In deciding that the state had not complied with the procedural prerequisites so as to assume jurisdiction on the Papago Reservation under P.L. 280, the court said:

> "Arizona has neither amended its constitution nor passed such appropriate legislation as would confer upon its officers the power to make service of process to Indians on Indian lands. Nor has the state acquired the requisite consent of the Papago Indian Tribe to do the same. It is therefore clear that Arizona has not displayed a desire to assume either jurisdiction over Indian lands or its concomitant responsibilities. (emphasis added) (556 P.2d at 5.)

Wauneka v. Campbell, 22 Ariz. App. 287, 526 P.2d 1085 (1974), involved the applicability of the Arizona Motor Vehicle Safety Responsibility Act to automobile accidents between Indians on the Navajo Reservation. In concluding that the Act was not applicable to such accidents the court held that even if the Navajo Code could be construed as a consent by the Indians to jurisdiction ". . . the state's authority would still be vacuous because there has been no appropriate amendment to the

Arizona constitution or statutes" (Wauneka v. Campbell, supra, 526 P.2d at 1087).

In Battese v. Apache County, No. 15328 (Az. Supreme Ct., June 25, 1981), the State Supreme Court considered an attempt by the state to tax real property held in fee by Navajo Indians located within the Navajo Reservation. The court concluded that such taxation was invalid for a number of reasons, including the state's failure to comply with the provisions of P.L. 280:[6]

> Arizona has not amended its constitution nor obtained consent of the Navajo Tribe to assume jurisdiction over their affairs, pursuant to [P.L. 280]. (emphasis added)

The above-cited cases indicate that under Arizona law the jurisdictional disclaimer in the Arizona Constitution would have to be repealed by a vote of the people, as opposed to mere legislative action, in order for the state to assume jurisdiction.

This opinion is shared by the Attorney General for the State of Arizona. In 1960 a state senator asked the Attorney

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[6]In light of Bryan v. Itasca County, supra, it is unlikely that even P.L. 280 jurisdiction would support the kind of taxation attempted in Battese.

General the following question:

> "May the State of Arizona assume jurisdiction over the Indian Reservations pursuant to Public Law 280 by Legislative enactment without a constitutional amendment?

The answer of the Attorney General was "No." In support of his conclusion the Attorney General emphasized that Article XXI of the Constitution requires that amendments be submitted to the vote of the people. He further indicated that this procedure had been followed on two previous occasions in order to effect amendments.

The Attorney General also compared the situation in the State of Washington since he was aware of the fact that Washington had complied with P. L. 280 by mere legislative enactment. In concluding that the approach followed by Washington would not be sufficient in Arizona, the Attorney General said:

> "At the time that Arizona was admitted into the Union, the initiative and referendum were included within the Constitution. We can, therefore, distinguish State v. Paul upon these grounds. It does seem that this is not a strong distinction and that State v. Paul could be authority in Arizona notwithstanding the initiative and referendum feature, however, to so hold would be contrary to the established ruling that no part of a constitution can be amended without following the constitutional provision of

amending.

(60 Opinions of the Attorney General at p. 61)

The Attorney General's legal conclusion is fully supported by the decision of the Arizona Supreme Court in State v. Nabours, 77 Ariz 240, 286, P.2d 752 (1955). As noted by the Attorney General, Article XXI of the Arizona Constitution provides that the initiative procedure is the sole method of amendment provided for in the consituttion. In Nabours the Supreme Court of Arizona recognized that Article II of the consitution provided that "Provisions of this constitution are mandatory, unless by express words they are declared to be othewise." Construing that language the Supreme Court said that ". . . the word 'mandatory' as used in this constitutional provision is defined as a command and hence obligatory, with which we must implicitly follow and obey." Nabours, supra 286 P.2d at 754.

As a matter of state law the Constitution of the State of Arizona must be amended by the people before the Arizona courts may exercise jurisdiction under the McCarran Amendment over Indian water rights.

Other western states will not necessarily be affected by this Court's decision on this point. Colorado, for example, does

not have a similar disclaimer and therefore does not face the problem. Likewise, Washington State does not have a problem since under State v. Paul and the other cases relied upon in Yakima, it is clear that simple legislative enactment can remove any such barrier in Washington's constitution. This Court's refusal to find the existence of jurisdiction in this case would not undermine the Congressional intent underlying the McCarran Amendment.

Certainly, the McCarran Amendment may not be viewed as a pre-emption of the State of Arizona's prohibition to the assertion of jurisdiction over Indian lands and water. In National League of Cities v. Ussery, 426 U.S. 833 (1975), the Supreme Court reaffirmed prior rulings that there are limits upon the power of Congress to override state sovereignty:

> "We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because [the Tenth Amendment of] the Constitution prohibits it from exercising the authority in that manner. 426 U.S. at 845.

One undoubted attribute of state sovereignty is a state's power to determine the extent of jurisdiction it wishes to confer upon its courts. Congress may not constitutionally

require a state to assume jurisdiction which the state has chosen not to assume. Hence, in Arizona federal jurisdiction to adjudicate Indian water rights is exclusive at least until the state affirmatively acts to remove the jurisdictional limitation contained in its constitution.

II. The Sovereign Immunity Of The United States To This Proceeding Has Not Been Waived Because It Is Not A "Suit" Within The Meaning Of The McCarran Amendment.

The McCarran Amendment, 43 U.S.C. 666 is a limited waiver of the sovereign immunity of the United States to "any suit . . . for the adjudication of the rights to the use of water to a river system or other source . . ." [Emphasis added]. The only case which we have dicovered which defines the term "suit" within the context of this statute is Rank v. United States, 142 F.Supp. 1, 70-73 (S.D. Cal. 1956), rev'd on other grounds, 293 F.2d 340 (9th Cir. 1961) and 307 F.2d 96 (9th Cir. 1962), modified, 372 U.S. 609 (1963). The district court held:

> "The word "suit" does not include a proceeding before a State Water Board, of the so-called adjudication of water rights on a stream. In the case of In re Silvies River, D.C. Or. 1912, 199 F. 495, a so-called adjudication proceeding under the laws of Oregon . . . was removed to Federal court, but it was remanded on the ground that such a proceeding was not a suit . . . 142 F.Supp. at 71.

The district court, after examining the use of the phrases "judgment, orders, and decrees of the court" and "no judgment for costs" in the statute, concludes that Congress only intended that United States' immunity would be waived to suits in a court of law.

When defining the term "suits" as used in federal statutes, the courts have stated that:

> The term is * * * understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice which the Law affords him. The modes of proceeding may be various, but if a right of is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought is a suit.

Weston v. City Council of Charleston, 27 U.S. (2 Pet.) 289, 300 (1829); accord, Cohens v.Virginia, 19 U.S. (6 Wheat.) 269, 405 (1821); Kohl v. United States, 91 U.S. 367, 375 (1876). On the other hand, where Congress contemplated that parties may seek relief in administrative as well as judicial forums, it has used the term "proceeding" to indicate such intent. The word "proceeding" is broader in meaning than the term "suit" or "action." Bowers v. N..Y. & Albany Company, 273 U.S. 346, 349, 352 (1927); In Re Adoption of a Minor, 136, F.2d 790, 791, 792 (D.C. Cir. 1943).

Thus, by using the terms "suit" and "court" in the McCarran Amendment, Congress carefully limited its waiver of sovereign immunity to judicial proceedings, not administrative adjudications. Waivers of sovereign immunity are to be narrowly construed and may not be extended by implication. United States v. Mitchell, 445 U.S. 535, 538 (1980); United States v. Sherwood, 312 U.S. 584, 586-587 (1941).

The decisions of the United States Supreme Court in United States v. District Court for Eagle County, 401 U.S. 520 (1971) and Colorado River Water Conservation District v. United States, 424 U.S. 800 (1974), provide no support for a contrary reading of the McCarran Amendment. In both of these cases, an officer of the court, rather than an employee of the state executive branch, was the fact-finder, a procedure which plainly distinguishes these cases from the present proceeding.

An administrative adjudicatory proceeding is not a "suit" even though it may ultimately culminate in a judicial action. As stated in Upshur County v. Rich, 135 U.S. 467, 477 (1890):

> The principle to be deduced from these

> cases is, that a proceeding, not in court of justice, but carried on by executive officers in the exercise of their proper functions, as in the valuation of property for the just distribution of taxes or assessments, is purely administrative in its character, and cannot, in any just sense, be called a suit; and that an appeal in such a case, to a board of assessors or commissioners having no judicial powers, and only authorized to determine questions of quantity, proportion and value, is not a suit, if made to a court or tribunal having power to determine questions of law and fact, with or without a jury, and there are parties litigant to contest the case on the one side and the other.

The question then becomes whether this proceeding is judicial or administrative in character. To resolve that question Arizona's newly enacted general adjudication statute must be closely examined. Upon a surface analysis the proceeding has some trappings of a law suit. A general adjudication is defined as "an action for the judicial determination . . . of the extent and priority of the rights . . . to use water." A.R.S. §45-251.1. Proceedings are begun by filing a petition in Superior Court. A.R.S. §45.252.C. Summons and the petition are to be served. A.R.S. §45-253.A. The Superior Court shall enter the final judgment. A.R.S. §45-257.B.

But in fact, the judicial aspects of this proceeding are mere window dressing and the essential determinations of fact and law are in the hands of an administrative agency of the

state, the Department of Water Resources (hereafter D.W.R). Section 45-256 of the Arizona Revised Statutes sets forth the duties of the D.W.R. in great detail. It is necessary to closely examine those duties.[7]

The court or the master must request the "technical assistance" of the director of the D.W.R. within the director's "hydrological or other expertise." A.R.S. §45-256.A. The director must: (1) set the boundaries of the proceeding and identify all potential claimants; (2) obtain all "public and other records" concerning any factual or legal issue; (3) conduct a general examination of the stream to be adjudicated; (4) investigate the facts relating to each claim; (5) make a map showing the water sources and uses; and finally (6) "take such other steps and gather such information as may be

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[7]Judge Richey's order of January 21, 1980, in the case of Gila River Indian Community v. Asarco, et al., Civ. No. 78-145, TUC-MAR, U.S.D.C. Arizona, does not preclude these arguments. The United States was not a party to that case and therefore the doctrines of res judicata and collateral estoppel cannot apply. The case was originally briefed under the old adjudication statute. While the suit was pending the state legislature enacted the present system and the court concluded only that the arguments that the proceedings were administrative in character and that the State Land Department had a conflict of interest were mooted by the passage of the new act.

necessary or desirable for a proper determination of the relative rights of the parties." A.R.S. §45-256.A.6 [Emphasis added]

The director is mandated to define the proceedings, determine who shall be a party, investigate the factual assertions of each of the claimants, determine the legality of each of the claims, and gather whatever information he deems necessary for a proper determination of the relative rights of the claimants. This is indeed a sweeping mandate.

Having gathered all the relevant information, made the investigation of each claim, defined the boundaries, and drawn the maps, the director is to make a "report" which "shall . . . set forth in summary form on a claim by claim basis . . . and [which shall be] filed with the court." A.R.S. §45-256.B. In other words, the director writes the document that becomes the basis of the decree before there are any adversary fact-finding proceedings.

There is in actuality only judicial review of uncontested administrative factual and legal determinations. A claimant will not have an opportunity to present any protest or evidence to refute competing claims, or to present evidence to support his claim until after the entire decree is written.[8]

Section 45-256.B and C, set forth the procedures to be followed by the Master and the court following the filing of the Director's report. First, the Director must issue a preliminary report and receive comments. He is to revise his report "as may be appropriate" and then file the report with the court or the master. Within one hundred and eighty days of the filing of the report any claimant may file written objections to the report. Any portion of the report which has not been objected to "may be summarily admitted into evidence." Those claimants having filed written objections to the report will be accorded an opportunity to present evidence to support their objections.

It is at this point that the proceedings become judicial

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[8]There is also a serious question of whether such a procedure accords due process to the parties. A claimant has the burden of proving that the conclusions of the Director regarding his claim are wrong. Moreover, the claimant has only the statements of other claimants to review. He has no opportunity to examine other claimants and test the strength of their claims in an adversary proceeding until the second draft of the report has been completed and forwarded to the court for hearing. The Arizona procedure does not permit timely presentation of evidence to support claims or to challenge competing claims; it is a duplicative administrative process which unfairly assigns burdens of proof. By the time evidentiary hearings are provided for, the court's opportunity to hear and rule objectively has been prejudiced by the Director.

in character if at all. See Upshur County v. Rich, supra, 135 U.S. at 477; Pacific Livestock Co. v. Oregon Water Board, 241 U.S. 440, 446 (1916). The fact finding proceedings are not judicial in character, and hence the sovereign immunity of the United States has not been waived to this proceeding.

Waivers of the sovereign immunity of the United States are to be strictly. United States v. Sherwood, 312 U.S. 584 (1941). Congress when waiving the immunity of the United States may define the conditions under which it may be sued. Mitchell v. Riddell, 402 F.2d 842 (9th Cir. 1968). As we have shown, Congress has waived the immunity of the United States only to suits for the adjudication of water rights, and these proceedings are administrative in character. This court has no discretion under the statute to retain the fact finding function to itself. The legislature has dictated that the D.W.R. shall conduct an administrative determination of the facts.

In Pacific Livestock Co. v. Oregon Water Board, 241 U.S. 440, 446 (1916), the Supreme Court notes that "the attempted removal [of a proceeding very similar to that here] was not sustained, for the District Court remanded the proceeding and in that connection held that while it was pending before the board it was essentially preliminary and

administrative, and not a suit at law or in equity within the meaning of the remand statute. In re Silvies River, 199 Fed.Rep. 495." (Emphasis added) Here, for purposes of the McCarran Amendment, these proceedings are "essentially preliminary and administrative, and not a suit at law or in equity." This action must be dismissed as to the United States since the sovereign immunity of the United States has not been waived to this administrative proceeding.

III. THE DEPARTMENT OF THE WATER RESOURCES MAY NOT ACT AS THE COURT'S TECHNICAL ADVISOR.

The United States contends that the D.W.R. may not act as the court's technical advisor because of Canon 3 C of the Code of Judicial Conduct adopted in Arizona by Rule 45 of the Arizona Supreme Court. That Canon provides in part that:

> "(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (b) he knows that he served as a lawyer in the

> matter in controversy, or he knows that a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

This Canon of conduct applies to all those persons who are acting in a judicial capacity. At the foot of Rule 45 the following appears:

> "This Code shall govern all of the justices and judges of all of the courts in Arizona's judicial system performing judicial functions, including an officer such as a court commissioner, justice of the peace and city or town magistrate.

The director of the D.W.R., in his official capacity, and the D.W.R. itself cannot be impartial in their consideration of the claims of the United States on behalf of Indian tribes so that under the Canon they must be disqualified as the court's technical advisor.

Attached to this memorandum is a copy of a complaint in a proceeding entitled Bruce Babbitt, Governor of the State of Arizona, Wesley E. Steiner as Director and for and on behalf of the Department of Water Resources v. Cecil D. Andrus, Secretary of the Interior, Civ. No. 80-992 PHX-EHC, U.S.D.C. Arizona, verified by Wesley Steiner, Director of the D.W.R. (Exhibit 1). By his complaint, the Diretor sought to enjoin the

signing of contracts by the Secretary to supply C.A.P. water to some of the same Indian tribes for which the United States will claim water in these proceedings. There are also attached copies of a transcript of Mr. Steiner's testimony at a hearing in the above-cited case. (Exhibit 2). A transcript of the testimony of Mr. Steiner in the case of Arizona v. California, No. 8 Original, United States Supreme Court (exhibit 3) as well as a series of exhibits prepared by the D.W.R. and introduced into evidence in that case (Exhibit 4) are also appended. The director's testimony in Arizona v. California, supra, was in opposition to claims for additional water rights made by the Untied States on behalf of several Indian reservations in Arizona on the main stem of the Colorado River.

These appended documents demonstrate that the finder of fact in this proceeding, the director and the D.W.R. have conflicting duties and preconceptions of the merits of the Indian claims which make it impossible for them to be impartial in considering those claims. In fact, the D.W.R. may fairly be characterized as an opponent of the United States as the trustee of Indian water rights in the proceedings cited above and in those consolidated cases.

In a complaint, in Babbitt v. Andrus, supra, attached as

Exhibit 1, Mr. Steiner swore that:

> "If the Defendant [Secretary of the Interior Andrus] enters into contracts with the Indian tribes in the amount of 309, 828 acre-feet with the priority indicated, the C.A.P. supply available for non-Indian municipal and industrial uses will be substantially reduced in years of less than normal supply. This will permanently and irreparably impair the Director's ability to meet the mandates of the Arizona water management code. Complaint, page 8, paragraph 13.

And further:

> Plaintiff Steiner has responsibilities under Arizona law which will be adversely impacted by the failure to prepare an Environmental Impact Statement, including water resource and water quality planning, A.R.S. §45-105, groundwater administration, A.R.S. §45-401, C.A.P. coordination responsibilities, A.R.S. §45-107, and water and power planning, A.R.S. §45-2501. State policies concerning groundwater and surface water conservation and management mandated by these statutes and others and given to the Director to administer will be thwarted. Complaint, page 11, paragraph 26.

And Again:

> If this Court does not enter a temporary restraining order and injunction preventing Defendant Andrus from entering into contracts to supply C.A.P. water to the Indian tribes, the Plaintiffs will be permanently and irreparably injured and damaged in that: (a) the ability of the Governor to supervise executive business of the State with regard to environmental and water resource law and programs will be impaired, and (b) the ability of the Director of

> the Department to carry out his duties to achieve a balance between water consumption and the dependable supply as mandated by State law will be substantially impaired. Plaintiffs have no plain, adequate and speedy remedy at law. Complaint, page 13, paragraph 31.

Mr. Steiner has sworn in his official capacity as director of the D.W.R. that the increased allocation of C.A.P. water to some of the tribes involved here would impair his ability "to carry out his duties to achieve a balance between water consumption and the dependable supply as mandated by State law . . ." Likewise, approval of Indian claims to water in this proceeding—which may well be larger than the C.A.P. allocations at issue in Babbitt v. Andrus, supra,—will impair his ability to carry out his other duties as director. As a result he and the D.W.R. must therefore be disqualified.

At the hearing on the preliminary injunction in Babbit v. Andrus, supra, Mr. Steiner testified further amplifying those duties outside of his duties as technical advisor. Exhibit 2, pp. 58-70. These other duties conflict directly with his duties as a technical advisor in that they entail making water management decisions which will not be involved in the litigation but are inextricably linked to his decisions upon the Indian claims. This testimony supports the conclusion that the director and

D.W.R. cannot be impartial in considering the Indian claims.

At page 74 of the transcript, Mr. Steiner was asked:

"Q. All right. Now, let's do that, if we may, and I would ask you now to detail for the record and for the Court those areas where you feel that there are inaccuracies or misstatements.

He responded in part on page 75 that:

A. * * * Six, the claim that quote to the extent C.A.P. water is used to settle Indian water rights claims this will result in a substantial additional subsidy to the non-Indian water users of Arizona end of quote, unfairly presumes that the Indians' claims are valid.

The clear implication is that Mr. Steiner belives that the Indian claims—even to the extent that C.A.P. allocations would partially satisfy them—are invalid.

On page 78 Mt. Steiner testified that:

" Eight, the permanent tribal homeland allocations are arbitrary and not made on any rational consistent basis. The claim that the San Xavier and Schuktoak unit allocations are based on minimum water supply for economic farming units is unsupportable and unsupported.

On page 82 he testified that:

Q. Please indicte to the Court as to whether you feel this is imprtant for you, to comment upon the preparation of an environmental impact statement for contracting for Indian water?

A. Well, I think it is extremely important in that it would allow us to point out the inequities

and the impacts on the environment. It would allow us to point the problems and the difficulties that I just outlined, the omissions, the inaccuracies, this sort of thing that weren't treated, or were inadequately treated. It would permit this input before the Indian contracts are signed, before design and construction decisions are made and money is committed, and actions that make the Secretary more inclined to tolerate environmental injury and, in fact, commit him to turn to mitigation measures to minimize adverse impacts rather than to an alternative allocation of the use of this limited resource.

After lunch break he testified on page 84 that:

> The Governor and I were in very active negotiations with the Secretary * * * and we had every reason to expect that there would be a substanital change made in that allocation. [Emphasis added.]

It would unduly lengthen this memorandum to quote fruther from Mr. Steiner's testimony. However, the above-quoted excerpts from the sworn complaint and his testimony are ample evidence that the impartiality of the director and the D.W.R. may reasonably be questions, that the director and the D.W.R. have a bias or prejudice, that they have knowledge of disputed evidentiary facts, and that the director has served as a material witness concerning the matter in controversy. One cannot escape the conclusion that the director and the D.W.R. may not serve as the court's technical advisor.

Turning then to Arizona v. California, No. 8 Original, United States Supreme Court, the director testified in opposition to the efforts of the United States and several Indian tribes to increase the tribes' allocation of water from the main stem of the Colorado River. The thrust of his testimony concerned the State of Arizona's reliance on an earlier decree in Arizona v. California, 373 U.S. 546 (1963), in formulating plans for water supply and use in Central Arizona. Mr. Steiner and the D.W.R. prepared a series of Exhibits, States Exhibits 31 through 38, which were admitted into evidence. Copies of these Exhibits are appended to this memorandum. At the lower right corner of each exhibit the legend "Arizona Department of Water Resources 8/12/80" appears.

These exhibits and the testimony, upon both direct and cross-examination, Mr. Steiner gave concerning them deserve close scrutiny by this court.[9] It may be conservatively stated that the exhibits and the testimony illustrate the lack of

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[9]See the following pages of the transcript (Exhibit 3):

pp. 2722-2754	Direct
pp. 2778-2789	Cross
pp. 2817-2828	Cross
pp. 2861-2866	Cross

impartiality , the bias and prejudice, and the prior knowledge of the director and the Department concerning the claims of the Central Arizona Indian tribes. In addition the director was a material witness concerning the Central Arizona tribes claims to water. The testimony of Mr. Steiner and the exhibits cited here demonstrate that the director and the D.W.R. belive that the Indian claims are inequitable and, if allowed, would work hardship on the non-Indians of the State. The exaggerated and distorted figures used the D.W.R is in Exhibits 31 to 38 (Exhibit 4 to this memorandum) are evidence of the director's and the Department preconception that the Indian claims are inequitable. The Canons of Judicial Conduct forbid the director and the D.W.R. from acting as the court's technical advisor.

We have chosen the above instances of the director's and the Department's lack of impartiality, bias and prejudice, and prior knowledge and testimony concerning the matter in controversy as illustrations of a pattern. The fact that we do not discuss other such illustrations contained in the exhibits should not be construed as limiting our argument to just the cited incidents.

The lack of impartiality we allege is that of the

institution of the D.W.R. and not of its director or any other official in his personal capacity. Mr. Steiner is the plaintiff in the case of Babbitt v. Andrus, supra, in his official capacity as director of the D.W.R. Hence, even if Mr. Steiner were to be disqualified from acting in these cases, the D.W.R. could not continue to act, because it an institutional bias and lack of impartiality rather than a personal one.

The provisions of A.R.S. § 45-256.A concerning the technical assistance of the D.W.R. to the court or the master are mandatory and leave this court no discretion to either not request the assistance or to request such assistance from a person or entity other than the D.W.R. This action must be dismissed because the court cannot comply with the statutory procedure and accord the parties due process at the same time.

Another serious due process concern is that the State is a claimant in these proceeding. Hence, one agency of the executive branch, the D.W.R., will be sitting in judgment of claims made on behalf of the state government by another arm of the executive branch, the State Land Department. The state, if the D.W.R. is to act as the technical advisor, will sit in judgment of its own claims. The violation of the requirements of due process is patent. In re Murchison, 349

U.S. 133 (1955).

Finally, in the usual state adjudication, all users claim under the authority of state law and hence the state has little interest in favoring one claimant over another, except in accordance with principles of the prior appropriation doctrine. Here, however, the United States will claim substantial reserved rights as trustee for several Indian Tribes and on its own behalf for other federal agencies. Winters v. United States, 207 U.S. 564 (1908); Arizona v. California, 373 U.S. 546 (1963); United States v. New Mexico, 438 U.S. 696 (1978). These rights will be claimed pursuant to federal law and will, most likely, clash with a variety of rights previously sanctioned by the state. The federal rights are outside of the normal reach of the state administrative system which is run by the D.W.R. See e.g. A.R.S. Title 45, Chapters 1 and 2. It will be difficult for the D.W.R. to be objective in judging the federal claims because of the Department's other responsibilities in administering water rights in the state.

In conclusion, the Supreme Court in the case of In re Murchison, 349 U.S. 133, 136 (1955), stated the following concerning the appearance of fairness in judicial proceedings:

"A fair trial in a fair tribunal is a basic

> requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that "every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." Tumey v. Ohio, 273 U.S. 510, 532, 71 L. ed 749, 758, 47 S.Ct. 437, 50 ALR 1243. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice." Offutt v. United States, 348 U.S. 11, 99 L. ed 11, 75 S.Ct. 11.

If the D.W.R. is allowed to act as the court's technical advisor it will be "a judge in [its] own case" and it will be sitting where it "has an interest in the outcome" and the United States will be deprived of due process of law.

Conclusion

For the foregoing reasons this action must be dismissed as to the United States.

Respectfully submitted,

/s/
STEVEN E. CARROLL
Attorney
Department of Justice
Land and Natural Resources
Division
10th and Pennsylvania Ave., N.W.
Washington, D.C. 20530

[Certificate of Service omitted]

TREATY WITH THE APACHES. July 1, 1852

FRANKLIN PIERCE,

PRESIDENT OF THE UNITED STATES OF AMERICA:

TO ALL AND SINGULAR TO WHOM
THESE PRESENTS SHALL COME, GREETING:

Whereas a Treaty was made and concluded at Santa Fe, New Mexico, on the first day of July, in the year of our Lord one thousand eight hundred and fifty-two, by and between Col. E. V. Sumner, U.S.A., commanding the 9th Department, and in charge of the Executive Office of New Mexico, and John Greiner, Indian Agent in and for the Territory of New Mexico, and acting Superintendent of Indian Affairs of said Territory, representing the United States, and Cuentas Azules, Blancito, Negrito, Captain Simon, Captain Vuelta, and Mangus Colorado, chiefs, acting on the part of the Apache nation of Indians, situate and living within the limits of the United States, which treaty is in the words following, to wit:

Articles of a Treaty made and entered into at Santa Fe, New Mexico, on the first day of July in the year of our Lord one thousand eight hundred and fifty-two, by and between Col. E.V. Sumner, U.S.A., commanding the 9 Department and in charge of the Executive Office of New Mexico, and John Greiner, Indian Agent in and for the Territory of New Mexico and acting Superintendent of Indian Affairs of said Territory, representing the United States, and Cuentas, Azules, Blancito, Negrito, Capitan Simon, Capitan Vuelta, and Mangus Colorado, chiefs, acting on the part of the Apache Nation of Indians, situate and living within the limits of the United States.

ARTICLE 1. Said nation or tribe of Indians through their authorized Chiefs aforesaid do hereby acknowledge and declare that they are lawfully and exclusively under the laws, jurisdiction, and government of the United States of America, and to its power and authority they do hereby submit.

ARTICLE 2. From and after the signing of this Treaty hostilities between the contracting parties shall forever cease, and perpetual peace and amity shall forever exist between said Indians and the government and people of the United States; the said nation or tribe of Indians, hereby binding themselves most solemnly never to associate with or give countenance or aid to any tribe or band of Indians, or other persons or powers, who may be at any time at war or enmity with government or people of said United States.

ARTICLE 3. Said nation, or tribe of Indians, do hereby bind themselves for all future time to treat honestly and humanely all citizens of the United States, with whom they may have intercourse, as well as all persons and powers, at peace with the said United States, who may be lawfully among them, or with whom they may have any lawful intercourse.

ARTICLE 4. All said nation, or tribe of Indians, hereby bind themselves to refer all cases of aggression against themselves or their property and territory, to the government of the United States for adjustment, and to conform in all things to the laws, rules, and regulations of said government in regard to the Indian tribes.

ARTICLE 5. Said nation, or tribe of Indians, do hereby bind themselves for all future time to desist and refrain from making any "incursions within the Territory of Mexico" of a hostile or predatory character; and that they will for the future refrain from taking and conveying into captivity any of the people or citizens of Mexico, or the animals or property of the people or government of Mexico; and that they will, as soon as possible after the signing of this treaty, surrender to their agent all captives now in their possession.

ARTICLE 6. Should any citizen of the United States, or other person or persons subject to the laws of the United States, murder, rob, or otherwise maltreat any Apache Indian or Indians, he or they shall be arrested and tried, and upon conviction, shall be subject to all the penalties provided by law for the protection of the persons and property of the people of the said States.

ARTICLE 7. The people of the United States of America shall have free and safe passage through the territory of the aforesaid Indians, under such rules and regulations as may be adopted by authority of the said States.

ARTICLE 8. In order to preserve tranquillity and to afford protection to all the people and interests of the contracting parties, the government of the United States of America will establish such military posts and agencies, and authorize such trading houses at such times and places as the said government may designate.

ARTICLE 9. Relying confidently upon the justice and the liberality of the aforesaid government, and anxious to remove every possible cause that might disturb their peace and quiet, it is agreed by the aforesaid Apache's that the government of the United States shall at its earliest convenience designate, settle, and adjust their territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians.

ARTICLE 10. For and in consideration of the faithful performance of all the stipulations herein contained, by the said Apache's Indians, the government of the United States will grant to said Indians such donations, presents, and implements, and adopt such other liberal and humane measures as said government shall deem meet and proper.

ARTICLE 11. This Treaty shall be binding upon the contracting parties from and after the signing of the same, subject only to such modifications and amendments as may be adopted by the government of the United States; and, finally, this treaty is to receive a liberal construction at all times and in all places, to the end that the said Apache Indians shall not be held responsible for the conduct of others, and that the government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians.

In faith whereof we the undersigned have signed this Treaty, and affixed thereunto our seals, at the City of Santa Fe, this the first day of July in the year of our Lord one thousand eight hundred and fifty-two.

WITNESSES:

F. A. CUNNINGHAM, Paymaster, U.S.A.

J.C. McFERRAN, 1st Lt. 3d Inf. Act. Ast. Adj. Gen.

CALEB SHERMAN.

FRED. SAYNTON.

CHAS. McDOUGALL, Surgeon, U.S.A.

S.M. BAIRD, Witness to the signing to Mangus Colorado.

JOHN POPE, Bvt. Capt. T.E.

E.V. SUMNER, [SEAL.], Bvt. Col. U.S.A. com'g 9th Dept. In charge of Executive Office of New Mexico.

JOHN GREINER, [SEAL.], Act. Supt. Indian Affairs, New Mexico.

CAPITAN VUELTA, his X mark [SEAL.]

CUENTAS AZULES, his X mark [SEAL.]

BLANCITO _____, his X mark [SEAL.]

NEGRITO _____, his X mark [SEAL.]

CAPITAN SIMON, his X mark [SEAL.]

MANGUS COLORADO, his X mark [SEAL.]

AND WHEREAS the said Treaty having been submitted to the Senate of the United States,for its constitutional action thereon, the Senate did, on the twenty-third day of March, one thousand eight hundred and fifty-three advise and consent to the ratification of its articles, by a resolution in the words and figures following, to wit:

IN EXECUTIVE SESSION
SENATE OF THE UNITED STATES
MARCH 23, 1853.

Resolved, (two thirds of the Senators present concurring,) That the Senate advise and consent to the the ratification of the Articles of a Treaty made and entered into at Santa Fe, New Mexico, on the first day of July, in the year of our Lord, 1852, by and between Colonel E. V. Sumner, United States Army, commanding the 9th Department, and in charge of the Executive Office of New Mexico, and John Greiner, Indian Agent in and for the Territory of New Mexico, and acting Superintendent of Indian Affairs of said Territory, representing the United States, and Cuentas Azules, Blancito, Negrito, Capitan Simon, Capitan Vuelta, and Mangus Colorado, chiefs, acting on the part of the Apache nation of Indians, situate and living within the limits of the Unites States.

Attest- ASBURY DICKINS, Secretary

Now, therefore, be it known, that I, FRANKLIN PIERCE, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the twenty-third day of March, one thousand eight hundred and fifty-three, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be herewith affixed, having signed the same with my hand.

[L.S.] Done at the city of Washington, this twenty-fifth day of March, in the year of our Lord one thousand eight hundred and fifty-three, and of the Independence of the United States the seventy-seventh.

FRANKLIN PIERCE

BY THE PRESIDENT:

W. L. MARCY,
Secretary of State.

[SEAL]
SUPREME COURT
STATE OF ARIZONA
201-West Wing
Capitol Building
(602) 255-4536
PHOENIX 85007

S. Alan Cook
Clerk

November 25, 1981

IN THE MATTER OF THE DETERMINATION OF CONFLICTING RIGHTS TO THE USE OF THE WATER FROM THE GILA RIVER, BELOW ITS CONFLUENCE WITH THE SAN FRANCISCO RIVER, AND THE TRIBUTARIES OF THE GILA RIVER, INCLUDING THE SAN FRANCISCO RIVER, CHASE CREEK AND EAGLE CREEK	Supreme Court No. WC-1 Pinal County No. 31768
IN RE THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE SALT RIVER SYSTEM AND SOURCE	Supreme Court No. WC-2 Maricopa County No. W-1
IN RE THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE VERDE RIVER SYSTEM AND SOURCE	Supreme Court No. WC-3 Maricopa County No. W-2
IN RE: THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE SAN PEDRO RIVER SYSTEM AND SOURCE	Supreme Court No. WC-4 Cochise County No. W-1

The following action was taken by the Supreme Court of the State of Arizona on November 24, 1981 in regard to the above-entitled cause:

"ORDERED: Motion for Consolidation - GRANTED.

FURTHER ORDERED: Request for Oral Argument - DENIED."

S. ALAN COOK, CLERK

By /s/ Kathleen E. Kempley
Deputy Clerk

The foregoing is a full, true and correct
copy of the original on file in this office.
[SEAL]

ATTEST January 19, 1983
S. Alan Cook, Clerk of the Supreme Court
State of Arizona

By /s/ Arlene Bledsoe, Deputy